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No. 377

Court of Appeals

State of New York.

JOSEPH LANZA and SYLVESTER COSENTINO,
Plaintiffs-Appellants,

against

NEW YORK STATE JOINT LEGISLATIVE COMMITTEE OF GOVERNMENT OPERATIONS, WILLIAM S. HORAN, Individually and as Chairman, ARNOLD BAUMAN, Individually and as Chief Counsel,
Defendants-Respondents.

RECORD ON APPEAL.

EDWARD H. LEVINE,
Attorney for Plaintiff-Appellant, Sylvester Cosentino,
120 Broadway,
New York, N. Y.

MICHAEL P. DIRENZO,
Attorney for Plaintiff-Appellant, Joseph Lanza,
253 Broadway,
New York, N. Y.

BORIS BERKOVITCH,
Attorney for Defendants-Respondents,
15 Broad Street,
New York, N. Y.

THE REPORTER COMPANY, INC., NEW YORK 7, N. Y.—REctor 2-0978—1957

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Notice of Appeal.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK.

JOSEPH LANZA and SYLVESTER COSENTINO, Plaintiffs, against NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, Individually and as Chairman, ARNOLD BAUMAN, Individually and as Chief Counsel, Defendants.	Index No. 5063/1957

Sirs:

PLEASE TAKE NOTICE that defendants New York State Joint Legislative Committee on Government Operations, William S. Horan, Individually and as Chairman, Arnold Bauman, Individually and as Chief Counsel, hereby appeal to the Appellate Division of the New York Supreme Court in and for the First Department, from an order entered in the above-entitled action in the office of the Clerk of the County of New York on the 1st day of May, 1957, denying defendants' motion for judgment dismissing the complaint

Notice of Appeal

herein, and from each and every part of said order.

Dated: New York, N. Y., May 6, 1957.

Yours, etc.,

BORIS S. BERKOVITCH
Attorney for Defendants
15 Broad Street
New York 5, N. Y.

To:

Edward H. Levine, Esq.
Attorney for Plaintiff Cosentino
120 Broadway
New York 5, N. Y.

Michael P. Direnzo, Esq.
Attorney for Plaintiff Lanza
253 Broadway
New York, N. Y.

Archibald R. Watson
The Clerk of the County of New York

Order Appealed From.

SUPREME COURT OF THE STATE OF NEW YORK,

County of New York,

Special Term, Part III,

Index Number 5063, Year 1957.

[Same Title.]

Present:

Hon. Harold A. Stevens, Justice.

The following papers numbered 1 to 2 read on this motion, Argued Dec Res this 29th day of April, 1957.

Motion Calendar No. 1951

	Papers Numbered
Notice of Motion and Annexed Compt with Mo #1950	**1-2**

Upon the foregoing papers this motion is denied.

Enter

H. A. S.
J. S. C.

Dated May 1, 1957.

Brief in Support on Mo #1950

10 **Notice of Motion.**

SUPREME COURT OF THE STATE OF NEW YORK,

County of New York.

[Same Title.]

Sirs:

Please take notice, that on the pleadings and proceedings heretofore had herein, a cross-motion
11 will be made at a Special Term, Part III, of the Supreme Court, to be held in and for the County of New York at the County Courthouse, 60 Centre Street, in the Borough of Manhattan, City of New York, County of New York, on the 29th day of April, 1957, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, simultaneously with the hearing of plaintiffs' motion for an injunction, for an order:

I. Dismissing the complaint, pursuant to the provisions of Rule 106, subdivisions 1 and 4, of
12 the Rules of Civil Practice or, in the alternative,

II. Dismissing plaintiffs' pleading pursuant to the provisions of Section 1293 of the Civil Practice Act; and

III. Granting such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y., April 29, 1957.

Yours, etc.,

BORIS S. BERKOVITCH
Special Counsel to The New York State Joint Legislative Committee on Government Operations
Attorney for Defendants
Office & P. O. Address
15 Broad Street
New York 5, N. Y.

To:

(All Attorneys of Record.)

16 **Summons.**

SUPREME COURT OF THE STATE OF NEW YORK,

County of New York.

[Same Title.]

Plaintiffs designate New York County as the place of trial.

17 To the above named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiffs' attorneys within twenty (20) days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, April 27th, 1957.

18

EDWARD H. LEVINE, Esq.
Attorney for Sylvester Cosentino
Office and P. O. Address
120 Broadway,
New York, N. Y.

MICHAEL P. DIRENZO, Esq.
Attorney for Joseph Lanza
Office and P. O. Address
253 Broadway,
New York, N. Y.

Complaint. 19

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

Plaintiffs, by their respective attorneys, allege:

FIRST: That the defendant, New York State Joint Legislative Committee on Government Operations, was duly created in 1955 by the Legislature of the State of New York to investigate and examine the management of any State Department, Board, Bureau, Commissioner or other agencies of the State. 20

SECOND: That the defendant, William S. Horan, was duly appointed Chairman of the aforesaid Legislative Committee and the defendant, Arnold Bauman, Chief Counsel of said Committee.

THIRD: That the said Legislative Committee was empowered by the Legislature to make studies, among other things, of the operation of State Government with a view towards determining its economy, efficiency and effectiveness; administration of State Laws and the detection and prevention of unsound, improper or corrupt practices; and by virtue of the legislative law, was authorized to take testimony requiring the attendance of witnesses and such powers as are granted to Legislative Committees by the provisions of the Legislative law. 21

FOURTH: Upon information and belief, this New York State Joint Legislative Committee on

Government Operations, during the month of February, 1957, undertook to investigate the facts and circumstances concerning the alleged violation of parole of the plaintiff, Joseph Lanza, and did issue subpoenas to various witnesses to take testimony in connection therewith.

FIFTH: That simultaneously the Commissioner of Investigation, or the Acting Commissioner of Investigation of the State of New York clothed with similar powers was conducting an investiga-
23 tion of the same parole board by means of subpoenaing witnesses and taking testimony.

SIXTH: That both investigating committees were vying with each other to see which could get the most sensational headlines in the newspapers.

SEVENTH: That on or about the 12th day of April, 1957, the plaintiff, Sylvester Cosentino, was subpoenaed as a witness and called upon to testify before the Acting Commissioner of Investigation and refused to answer certain ques-
24 tions which were derived from a confidential relationship existing between the plaintiff, Joseph Lanza, client, and the plaintiff, Sylvester Cosentino, attorney. That because of the refusal of the plaintiff, Sylvester Cosentino, the attorney, to violate his obligation not to disclose confidential communications, a proceeding was commenced on the 16th day of April, 1957, to punish him for contempt, returnable before Special Term of the Supreme Court, held in and for the County of New York, and as yet not determined.

EIGHTH: That on the 5th and 6th days of February, 1957, the plaintiff, Sylvester Cosen-

tino, attorney had an interview with the plaintiff, Joseph Lanza, his client, at the Westchester County Jail in the counsel room with no one else present and unknown to the plaintiff, and by means of some instrument or electronic device, said conversations were overheard and recorded in violation of law and without the consent or knowledge of either plaintiff.

NINTH: Upon information and belief, that the said eavesdropping and recording of the confidential talk between the attorney and the client came into the possession of the defendants, William S. Horan, Chairman, and Arnold Bauman, Chief Counsel.

TENTH: That on the 26th day of April, 1957, there appeared in the Daily Press an announcement that the defendant committee, its Chairman and Chief Counsel would conduct public hearings in the Association of the Bar of the City of New York Building, at 36 West 44th Street, Borough of Manhattan, City of New York, commencing on the 29th day of April, 1957, and for several days following, wherein the defendant committee threatened to make public and divulge the contents of such illegally obtained recordings of the conversations between the plaintiff, Joseph Lanza client, and the plaintiff, Sylvester Cosentino attorney, by means of loud speakers and amplifiers, divulging and disclosing the contents of said recordings.

ELEVENTH: That on the same day, April 26th, 1957, the plaintiff, Sylvester Cosentino, verified from the defendant, Arnold Bauman, that the New York State Joint Legislative Committee on Government Operations would conduct

such hearings and would publicly divulge what was contained on the illegally obtained recordings.

TWELFTH: The plaintiff, Joseph Lanza has never expressly waived his privilege of confidential communications with his attorney which the defendants threaten to nullify in violation of the provisions of Section 353 and 354 of the Civil Practice Act.

29 THIRTEENTH: The plaintiffs assert and claim that the action of the defendants in threatening to divulge and disclose the contents of said illegally obtained recordings is wholly unlawful, contrary to law and will deprive the plaintiff, Joseph Lanza, of a right which he has not expressly or impliedly waived.

FOURTEENTH: The plaintiffs claim that the threatened acts and conduct of the defendants would cause injury and damage to the plaintiffs which is irreparable and wanton.

FIFTEENTH: The plaintiffs assert that they
30 have no adequate remedy at law unless the threatened acts of the defendants are enjoined immediately.

SIXTEENTH: That by reason of the foregoing, the plaintiffs assert that a judicial determination of their rights is desirable and necessary in order that all other persons similarly situated may not be deprived of their privilege of confidential relationships between an attorney and client. It is, therefore, advisable to request the Court to make a declaration of the rights of the parties in the nature of the relief to which plaintiffs may be entitled.

WHEREFORE, plaintiffs pray that a declaratory judgment be made and entered herein, adjudging and decreeing the following:

1. That the defendants and all others who are acting under their supervision be enjoined and restrained from carrying out the threat to divulge the confidential communication contained in those illegally obtained recordings.

2. That the defendants, their agents, servants and/or employees be directed to destroy the said illegally obtained recordings or to effectually suppress the use of the contents of said recordings illegally obtained.

3. That it be further ordered, adjudged and decreed that the defendants be enjoined and restrained from using or resorting to any of the contents of the said recordings.

4. That an order be made pending the determination of this action enjoining and restraining or in anywise using or making public any of the contents of said recordings or transcripts made thereof, and for such different and further relief as may be proper in the premises.

Yours, etc.,

MICHAEL P. DIRENZO, ESQ.
Attorney for Plaintiff, Joseph Lanza
EDWARD LEVINE, ESQ.
Attorney for Plaintiff, Sylvester Cosentino

(Verified April 27, 1957, by Sylvester Cosentino and Michael P. Direnzo.)

34 **Opinion of Stevens, J.**

Plaintiffs move for an injunction *pendente lite* to restrain defendants from using a certain recording or recordings of conversations between plaintiffs as attorney and client.

Plaintiff Cosentino alleges that he was retained as counsel for plaintiff Lanza, that in such capacity he visited him at the prison in which Lanza was incarcerated; that without the knowledge or consent of either, an electronic device had been installed to and which did record their conversation and that defendants now propose to publicize or broadcast the recording, a copy or transcription thereof. Plaintiffs contend this is an invasion of the privilege existing between attorney and client.

35

Defendants argue that the record held by them is a copy of a copy which has been heard by others in transcribing same, and therefore no privilege exists. They contend that there is no power in this court to restrain its use by defendants; that the conversation having been overheard (by electronic device), no privilege attaches; that Cosentino was not the attorney for Lanza, but even if he was, no privilege attaches.

36

Defendants contend that being a validly constituted legislative committee, and their ultimate objective being within the authority granted, we have no power to interfere with their discretion as to the admission of any evidence, however obtained. They cite State Educational System (285 N. Y. 1), in support of their position. That portion of the case to which they refer was an application to vacate a subpoena *duces tecum* and challenged the power of a joint legislative committee to require the production of appellant's membership list. The Court held that the com-

mittee had the power to issue such a subpoena, and used language to which our attention is directed forbidding "interference by the Court with the action of legislative bodies or the exercise of their discretion in matters within the range of their constitutional powers." That case has no application here. There was no specific privilege, existing in law, involved in that case, and as the Court pointed out they could not say, in advance, as a matter of law that the challenged subpoena would be futile as an aid to the legislative inquiry. 38

Though a committee be regularly and validly constituted, its objective legitimate and within the framework of the power conferred, that is not a license to use any and all methods for the acquisition of information. We are still a government of laws, and the courts will seek to protect the rights of persons against possible abuse in the invasion of established or recognized rights. The committee is not above the law if it infringes upon an area not impliedly or actually necessary to the performance of its proper functions, or seeks to negate a privilege long recognized in the law. It is immaterial that one of the parties is a convicted person. It is of equal importance that the rights of such a person be protected as that those of a person first accused be safeguarded. A system of law dual in interpretation and application could not long endure, nor could a government founded upon such a system survive indefinitely. 39

But, the committee argues, this conversation was overheard (by an electronic device) subsequently transcribed, and heard by the persons transcribing same so the privilege is lost. It is

true that the courts have said a communication is not confidential if made in the presence of a third person, and not privileged if a telephonic conversation is intercepted. In the first instance it is apparent that the communication was not made with the intention of confidentiality. In the second, the party aware of certain risks attendant upon the method of communication selected, assumed those risks.

Here we have a situation where an attorney sought to confer with his client. Under time-honored custom, sanctioned in common-law, reaffirmed in New York by statute, a privilege attached if the communication was both professional and confidential. The very aura surrounding the visit, to wit, the signing of the counsel book, the ushering of counsel into a special room where he and his client could be and were alone, evinces the intention of confidentiality. We find on the papers before us that plaintiff Cosentino was the attorney for Lanza at that time. The three affidavits of three parole officers dated April 26, 1957, which were not served on plaintiffs up to the time of the hearing of the motion; are remarkably similar in language and conclusions and do not convince us to the contrary. The plaintiffs and Lanza's present counsel state that Cosentino was Lanza's attorney. It would seem that the two officers of the court and the former parolee are better equipped than the parole board to determine the relationship.

This is not the case of a private third person overhearing a conversation because of the fault or carelessness of one or both parties. Obviously under such a condition there is no privilege, for the parties have impliedly waived the privilege

by failure to exercise that degree of care consonant with the importance of the situation.

The argument that the electronic device is comparable to a third person, though neither party was aware of or consented to its use, is without merit.

The contention of defendants that they did no wrong but are merely seeking to use the fruits of the acts of others whether such acts were right or wrong reveals a callousness unexpected. The failure to plead *mea culpa* cannot obscure the facts. This legislative committee is a representative of the sovereign power; so was the agency—individual or collective—which installed and/or operated the device. To permit the one to benefit by the wrong of the other is to make a mockery of the privilege. 44

The privilege was grounded in good reason and sound policy—to permit men to confer and consult freely that their rights might be preserved or protected. The privilege does not attach where the conversation refers to future wrongdoing, and there is no such contention here.

When the privilege was created it took cognizance of conditions then existing. True, the theory changed from he honor of the lawyer to embrace and include the apprehensions of the client. Equally true is it that originally it probably dealt only with testimonial compulsion. Who could foresee the development of electronic devices making useless the most elaborate precautions to safeguard the confidences of attorney and client? Yet law is neither static nor inflexibly rigid. It is to be construed to effectuate the purpose intended, and therefore must be given a liberal construction. Indeed, to hold or sanction 45

46 *Opinion of Stevens, J.*

the installation of such devices in counsel rooms is to render worthless the privilege, and deprive any accused of a basic right under our law—the right to a free and impartial trial. It would only be necessary for one agency of government commit the act—pass over the results to another agency which might sanctimoniously disclaim responsibility but enjoy the fruits thereof. The use of such a subterfuge is unworthy of the sovereign.

47 Motion granted. Temporary injunction continued. Settle order.

48

Notice of Appeal to Court of Appeals. 49

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

Sir:

PLEASE TAKE NOTICE that the plaintiffs above named hereby appeal to the Court of Appeals of the State of New York, from the judgment 50
in the above entitled action entered in the office of the Clerk of the County of New York, on the 16th day of May, 1957, which was entered upon an order of the Appellate Division of the Supreme Court, First Department, entered in the office of the Clerk of said Appellate Division on the 16th day of May, 1957, which said order reverses the orders of the Supreme Court at Special Term, dated May 1st and 3rd, 1957, and entered in the County Clerk's Office of the County of New York, (a) denying motion of defendants for judgment dismissing complaint and (b) granting plaintiffs' motion for an injunction 51
pendente lite,

PLEASE TAKE FURTHER NOTICE, that the plaintiffs appeal from each and every part of said judgment of said Appellate Division and from the

52 *Notice of Appeal to Court of Appeals*

intermediate order reversing Special Term's order granting an injunction *pendente lite.*

Dated: New York, New York, May 16th, 1957.

Yours, etc.,

EDWARD H. LEVINE, Esq.
Attorney for Plaintiff, Sylvester Cosentino
120 Broadway
New York, New York
and
53 MICHAEL P. DIRENZO, Esq.
Attorney for Plaintiff, Joseph Lanza,
253 Broadway
New York, New York

To:

Clerk of the County of New York
Archibald R. Watson

and

Boris Berkovitch, Esq.
Attorney for Defendants
15 Broad Street
54 New York, New York

Order of Reversal. 55

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the Appellate Division Courthouse, 27 Madison Avenue, City and County of New York, on the 16 day of May, 1957.

Present:

Hon. Charles D. Breitel,
Justice Presiding, 56
Hon. Benjamin J. Rabin,
Hon. Martin M. Frank,
Hon. Francis L. Valente,
Hon. James B. M. McNally,
Justices.

[Same Title.]

An appeal having been taken to this Court by the above named defendants-appellants from an order of the Supreme Court, New York County, Special Term, Part III, entered in the office of the Clerk of the County of New York on the 57
1st day of May, 1957, denying the cross-motion of said defendants-appellants for judgment dismissing the complaint,

And said appeal having been argued by Arnold Bauman, Esq., of counsel for the appellants, and by Edward H. Levine, Esq., of counsel for respondents, and due deliberation having been had thereon, and upon the decision and Per Curiam opinion filed herein on May 14, 1957.

58 *Order of Reversal*

It Is Unanimously Ordered that the order so appealed from be and the same hereby is reversed upon the law, and that said cross-motion for judgment dismissing the complaint herein be granted, and the Clerk is directed to enter judgment in favor of the defendant accordingly.

Enter,

C. D. B.

59

60

Judgment Appealed From. 61

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

JOSEPH LANZA and SYLVESTER COSENTINO, Plaintiffs, against NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, Individually and as Chairman, ARNOLD BAUMAN, Individually and as Chief Counsel, Defendants.	Index No. 5063/1957 62

The above named defendants having appealed to the Appellate Division of the Supreme Court, First Judicial Department, by notice of appeal dated May 6, 1957, from an order of this Court, entered in the office of the Clerk of the County of New York on May 1, 1957, denying the defendants' cross-motion, made pursuant to Rule 106 of the Rules of Civil Practice, for judgment dismissing the complaint herein, and said appeal having been argued on the original papers, and said Appellate Division, by order dated May 16, 1957, and entered in the office of the Clerk of said Appellate Division on May 16, 1957, having unanimously ordered that the order so appealed from be reversed upon the law, and that said motion for judgment dismiss- 63

ing the complaint be granted, and directing the Clerk to enter judgment in favor of the defendants accordingly, and a certified copy of said order of the Appellate Division having been filed in the office of the Clerk of the County of New York on May 16, 1957,

Now, on motion of Boris S. Berkovitch, Esq., attorney for the defendants, it is

ADJUDGED that plaintiffs' complaint herein be
65 and the same hereby is dismissed.

Judgment signed and entered this 16 day of May, 1957.

ARCHIBALD R. WATSON,
Clerk.

Filed May 16 1957
New York County Clerk's Office

66

Opinion of Appellate Division.

Per Curiam—This proceeding involves the question whether a joint legislative committee may be restrained from making public a tape recording and a transcript thereof of the supposedly private consultation between attorney and client in a local county jail. The client had been arrested as a parole violator. While in the local jail he was permitted to confer with his lawyer. The room, unknown to the lawyer or the prisoner, was wired to record any conversations. In some manner the committee has obtained the tape recording and has made transcripts therefrom. It proposes to make such transcripts public, the contents of such transcripts being concededly within the scope of the inquiry. The client and his lawyer have brought this action to enjoin the committee.

Special Term denied the committee's motion to dismiss the complaint and granted plaintiffs' motion for a temporary injunction. The committee appeals.

Actually, the fact of the relationship of attorney and client is disputed by the committee. But for the purposes of this proceeding the Court assumes that such relationship subsisted at the time and place in question.

As a further preliminary, it is recognized that the wiring of the consultation room and the recording of conversations between an attorney and his client, even if within the precincts of a prison, was a gross and inexcusable violation. It was a violation both of the statutory privilege between attorney and client and the constitutional right of a defendant or prisoner to consult with his attorney privately. Such intrusion, subject, as it may be, to certain sanctions and

penalties which may exist under appropriate provisions of law, does not prevent the use of the products of such intrusion before an appropriate forum by third parties who may have obtained such tape recordings or transcripts thereof.*

The privilege between attorney and client is that of the client. This is personal. It is a closely protected right. Indeed, even the lawyer is powerless to waive it; only the client can.
71 Yet the privilege is one that controls only the secrecy of communication between lawyer and client, and does not extend to inhibit strangers in revealing what they know.

The law is quite clear that the privilege conferring confidentiality upon communications between attorney and client relates only to a privilege against testimonial compulsion (8 Wigmore, Evidence, 3rd ed., 1940, secs. 2325, 2326; Richardson on Evidence, 8th ed., 1955, sec. 438). This, too, was the square holding of this Court in *Ehrlich v. Ehrlich* (278 App. Div. 244), which was cited, seemingly with approval, in *People v.*
72 *Decina* (2 N. Y. 2d 133, 145).

In the *Ehrlich* case a husband and wife were involved in matrimonial litigation. During the litigation the husband obtained telephone recordings of conversations between the wife and her lawyer and sought to use them upon a second trial, for which he had made an application. This Court held that the statutory privilege under Civil Practice Act, Section 353, subsisted. It had not been destroyed by the fact of surreptitious interception, but the contents of such con-

* See, however, L. 1957, chap. 880, eff. July 1, 1957. Cf., S. Int., 283 Pr. 283 (1957 Session—vetoed by the governor).

versations having become available to third parties, there was no privilege or rule which prevented their use in evidence.

In the *Decina* case the Court of Appeals, in holding that a confidential communication between physician and patient was nonetheless privileged, although two police guards overheard the conversations, referred to the *Ehrlich* case as holding that the privilege was not destroyed So, in this case, it is quite clear that the privilege of attorney and client between Mr. Lanza 74
and his lawyer, assuming the relationship, was neither waived nor destroyed by reason of surreptitious interception. But there is no limitation, insofar as privilege is concerned, on the use by third parties of what had been revealed of these confidential communications, so long as the third parties are not subject to any testimonial inhibition.

Of course, communication between an attorney and his client, especially where the client is a defendant in a criminal matter, involves much more than a mere privilege. Also involved
is the right to counsel, which carries with it the 75
corollary right to communicate with counsel in secrecy and confidence, and without intrusion, especially by public officials. In this case that constitutional right was violated, and, indeed, violated in an atrocious and inexcusable manner. The right, however, having been once violated, the information came into the hands of a number of public agencies from whom, or with respect to whom, the client had reason to fear prejudice. Unfortunately, a secret revealed may not be retrieved. That knowledge is irrevocably

theirs. As a matter of fact, even in this action, plaintiffs do not seek to restrain all public agencies having the information, but have singled out the committee. This does not mean, however, that the confidential communications thus obtained may be used against Mr. Lanza in any proceeding in which he is the target Indeed, they may not (*People v. Cooper*, 307 N. Y. 253; *Matter of Fusco v. Moses*, 304 N. Y. 424; *Coplon v. United States*, 191 F. 2d 749, 759).

77 The legislative inquiry, however, is another thing. It is concerned presently with the manner in which parole is handled in this state. As such, there is neither evidence nor is there any testimony involved which comes within the statutory privilege. Nor does the right to a fair trial or the constitutional right to counsel with reference to Mr. Lanza become involved. Consequently, neither the tape recordings nor transcripts thereof are precluded from use by any existing rule or provision of law.

Another serious question is raised. That question is whether a Court may, by prior restraint,

78 enjoin a proceeding of an arm of the legislative branch of government on the ground that the evidence it would use might not be received in a court of law because of some violation of law or constitutional right, either in the obtaining of it or by its use in evidence (see *Nelson v. United States*, 208 F. 2d 505, 513; *Hearst v. Black*, 87 F. 2d 68, 71; *Methodist Fed. for Social Action v. Eastland*, 141 F. Supp. 729, 731; cf. *Matter of Withrow*, 176 Misc. 597, 603; *Greenberg v. O'Brien*, 149 Misc. 866, aff'd 240 App. Div. 970; *Mezey Motors v. O'Dwyer*, 195 Misc.

160; for a *dictum semble contra* see *Matter of Edge Ho Hldg. Corp'n*, 256 N. Y. 374, 380). Some of the court feels that this threshold issue must be first determined and conclude that the Court is without further power to interfere. If pressed to decide the merits, they would determine otherwise. A majority, however, feels bound by the recognized principle that a constitutional question will not be reached unless it is unavoidable (*Matter of Peters v. N. Y. City Housing Authority*, 307 N. Y. 519, 527). Hence, 80
since the evidence in question is not subject to exclusion, we need not go so far as to determine that difficult constitutional question. On either view the same conclusion follows, namely, that the orders must be reversed.

Accordingly, the order granting the motion for temporary injunction should be reversed and the motion denied, and the order denying the cross-motion to dismiss the complaint for insufficiency should be reversed and the motion granted.

Settle orders on one day's notice. In the meantime plaintiffs may, if so advised, apply to the Court of Appeals for such relief as may 81
be appropriate.

All concur.

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FILED
AUG 16 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

Docket No. 377

JOSEPH LANZA and SYLVESTER COSENTINO,
Petitioners,

against

NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, individually and as chairman, ARNOLD BAUMAN, individually and as chief counsel,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York and for a Stay of Proceedings.

EMANUEL REDFIELD,
Counsel for Petitioners,
60 Wall Street,
New York 5, N. Y.

EDWARD H. LEVINE,
Counsel for Petitioners,
120 Broadway,
New York 5, N. Y.

THE REPORTER COMPANY, INC., NEW YORK 7, N. Y. REctor 2-6978—1957

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In The

Supreme Court of the United States

October Term, 1957

Docket No.

Joseph Lanza and Sylvester Cosentino,
Petitioners,

against

New York State Joint Legislative Committee on Government Operations, William S. Horan, Individually and as Chairman, Arnold Bauman, Individually and as Chief Counsel,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York and for a Stay of Proceedings.

Your petitioners, Joseph Lanza and Sylvester Cosentino, by Emanuel Redfield and Edward H. Levine, their counsel, pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York and that a stay be granted pending final disposition of the case, restraining respondents from using or publicly divulging the recordings of communications involved in this case.

Opinions Below.

The Court of Appeals wrote four opinions, one for the majority, and three (3) separate opinions by the dissenting Judges. They are reported in 3 N. Y. 2d 92. Copies are annexed hereto, as Appendix A.

The Appellate Division wrote an opinion, reported in 2 App. Div. (2) 531. A copy is printed in the record (R. 23).

Special Term wrote an opinion, reported in 5 Misc. (2) 324. A copy of which is found in the record (R. 12).

Jurisdiction.

(i) The date and time of entry of the judgment of the Court of Appeals is May 24, 1957. A copy is annexed hereto as Appendix B.

(ii) Jurisdiction is conferred on this Court by 28 U. S. C. 1257 (3).

Questions Presented.

This appeal presents constitutional questions of substance:

1. May a branch of the New York State government make surreptitious recordings in violation of the statutory and constitutional right of a prisoner to consult with his attorney in private?

2. May another branch of the government of the State of New York, make use of and publicly divulge such recordings?

3. Did the surreptitious recordings and the threatened use of them amount to a denial of the right of counsel to a person in jail, awaiting a hearing as a parole violator?

4. Did the surreptitious recordings and the threatened use of publicizing them operate to defeat the privilege against self-incrimination?

Constitutional and Statutory Provisions Involved.

The Fourteenth Amendment to the Constitution of the United States, the due process provision thereof.

Statement of the Case.

This action was begun in the Supreme Court of the State of New York by the service of a summons and complaint in which a declaratory judgment and injunction was sought, to restrain the respondents from using and publicly divulging surreptitious recordings made of communications between attorney and client (R. 7).

A temporary injunction was granted by Special Term (R. 12), which also refused to dismiss the complaint as requested by respondents' motion (R. 4).

Thereafter, the respondents appealed to the Appellate Division of the Supreme Court of the State of New York. The Appellate Division reversed the order which granted the temporary injunction, and dismissed the complaint (R. 19, 21).

Thereafter, the Court of Appeals by a four to three vote affirmed the judgment of the Appellate Division which had dismissed the complaint.

The Complaint.

Since the complaint alone is involved here, it is the source of the essential facts material to the questions presented. (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123.)

The complaint (R. 7) alleges that the New York State Legislative Committee was empowered by the Legislature to make studies of the efficiency and economy of governments to investigate corrupt practices. During Febru-

ary, 1957, the Committee undertook to investigate facts concerning the violation of parole of petitioner Lanza. That on February 5th and 6th, 1957, petitioner Lanza was incarcerated in the Westchester County Jail. Petitioner Cosentino as attorney for Lanza had a conference there, in the counsel room, with no other person present. By means of some instrument the conversations were recorded without their consent or knowledge.

The petitioner Cosentino on April 12, 1957, was subpoenaed to give testimony before the Acting Commissioner of Investigation concerning the conference. Upon said petitioner's refusal to testify to such communications, a proceeding to punish him for contempt was commenced.

These recordings came into possession of the respondents, who announced in the press on April 26, 1957, that they would conduct hearings beginning April 29, 1957, and that they would use the surreptitious recordings made and divulge them to the public by loud speakers. On April 26, 1957, the petitioner received confirmation from the respondent Arnold Bauman, its Chief Counsel, that the illegally obtained recordings would be publicly divulged.

Immediately upon learning these facts, the petitioners on April 27, 1957, commenced this action by the service of a summons and complaint, accompanied by papers for a temporary injunction.

How Constitutional Questions Were Raised.

A certificate was granted by the Court of Appeals in which it certified that the federal question of a denial of due process was raised and decided by it. The certificate is annexed to the record and a copy is annexed hereto as Appendix C. Under the rule in *Home Insurance Co. v. Dick*, 281 U. S. 397; *Charleston Federal Sav-*

ings & Loan Association v. Alderson, 324 U. S. 182, 186, it is sufficient that the federal constitutional question was raised and passed upon by the Court from which the appeal stems.

The federal questions however were raised in all courts below. Upon oral argument at Special Term the question was presented. That Court ruled in favor of petitioners and held that there was a denial of due process (R. 15, last line), where the Court said:

> "Indeed, to hold or sanction the installation of such devices in counsel rooms is to render worthless the privilege, and deprive any accused of a basic right under our law the right to a free and impartial trial."

In the Appellate Division and in the Court of Appeals the petitioners urged the federal constitutional question in its brief (Due to the speed with which these appeals were treated, the Court of Appeals accepted copies of the briefs used in the Appellate Division as the briefs in its court. A copy of petitioners' brief in the Appellate Division was lodged with Mr. Justice Harlan upon petitioners' application for a stay pending proceedings for certiorari).

The Appellate Division passed upon the questions (R. 25):

> "Of course, communications between an attorney and his client, especially where the client is a defendant in a criminal matter, involves much more than a mere privilege. Also involved is the right to counsel, which carries with it the corollary right to communicate with counsel in secrecy and confidence, and without intrusion, especially by public officials. In this case that constitutional right was violated, and, indeed, violated in an atrocious and inexcusable manner."

In the Court of Appeals the federal question of a denial of due process was raised and decided. That Court has granted a certificate to that effect.

In the opinion of that Court (p. 3a, this Petition), the Court said:

> "Plaintiffs contend that the use and divulgence of the recording in question violate the privilege between attorney and client afforded by the provision of Section 353, Civil Practice Act, and impair the client's constitutional right to counsel."

Again it was said (p. 4a, this Petition):

> "Of course, we agree with the courts below that the secret recording of the conversations in the manner alleged in the complaint was an unreasonable interference with Lanza's right to confer privately with counsel."

Those contentions were raised in the brief of petitioners (appellants) in the Court of Appeals. A copy of the brief was submitted to Mr. Justice Harlan. On page 7 under "The Applicable Provisions of Law" the appellants set forth the text of "United States Constitution, 14th Amendment, Sec. 1." The federal constitutional questions are argued on page 17 in the headnote, of the right to counsel and are argued again at pages 26, 28 and 34.

Judge Desmond in his dissenting opinion said (p. 10a, this Petition):

> "That the citizen's right to counsel is fundamental and that it includes private consultation with an attorney of his choice is settled beyond cavil in this court."

Also in Judge Dye's dissenting opinion throughout, reference is made to the Constitution and the constitutional right to counsel.

Judge Fuld in his dissenting opinion referred to the basic or constitutional principle of right to counsel and that the recordings in question violate due process.

A Stay of Proceedings is Also Necessary.

This petition also seeks a stay pending final disposition of this case. On or about June 4, 1957, the petitioners made application to Mr. Justice Harlan to stay the respondents from using or divulging the recording in question pending the order of this Court on the petition for certiorari. After a hearing before Mr. Justice Harlan, the respondents consented not to make use of or divulge the recordings. It is now requested that in the event a writ of certiorari is granted that a stay also be granted until final disposition of the case.

The Importance and Substantiality of This Case.

This case presents novel questions of a most serious nature affecting not only the entire community, but strike at the heart of the relationship of attorney and client. Here we find the right to counsel thwarted by the intrusions into the confidential relationship by surreptitious recordings in a jail made by one branch of the state government and use sought to be made of them by another branch.

Indeed, counsel had forewarned in all courts that to countenance such intrusions and use of recordings would lead to claims of other prisoners that consultations with counsel cannot be safely made in jail and therefore, the right to counsel is effectively denied.

On June 26, 1957, the *New York Times* carried an article on page 64 which more than realized those warnings. Under the heading "Dio Gets Freedom for Legal

PARLEY" it was said, with reference to the incident stated in this petition:

> "Later, Judge Mullen said:
>
> "'I am not interested in the name of the defendant. I became convinced by what was said by counsel that there was a necessity of permitting the defendants outside the Tombs for the purpose of free consultation.
>
> "'What prompted Mr. Braunstein to say that I do not know. I have an idea that the recent problem that has arisen through somebody putting a tape recording machine in these places, (prisons) leads counsel to believe every one of these places is tape recorded.'
>
> "The conversations of Joseph (Socks) Lanza, a racketeer, and his lawyer were tape recorded in Westchester County Jail recently."

It is submitted, that the case involves the very integrity of the relationship of attorney and client without which the legal profession could not survive, and strikes at the most fundamental concept of due process. That three Judges of the Court of Appeals wrote three separate dissenting opinions is an indication that this case is most important and that the issue is substantial. It is ripe for decision and should be resolved as soon as possible.

ARGUMENT.

The Court of Appeals held that the making of the recordings was an unreasonable invasion of the right to counsel, but it held: (1) that there was no denial of due process in the use of them by the respondents, a legislative committee, and (2) the Court had no power to restrain a legislative committee.

Our contention is that the right to counsel is an integral part of due process and is a fundamental right

protected by the federal constitution. This right implies the corollary that consultation between attorney and client shall be free from intrusion, especially by a governmental agency, when the client is in a jail. In a jail there is no choice of selection of a place free from intrusion. If this right is admitted, then it cannot be defeated because the communications were turned over by the wrongful intruding governmental agency to be used by another governmental agency. The reason is twofold: First, to permit the State, acting by its committee, to make use of the wrong committed by its other agency, the jailors, would disingenuously circumvent the guarantee of privacy afforded and the entire objective of the right to counsel. If the secret talks between an attorney and client can be "bugged" by one State agency to be used by another with impunity, then the original wrongful act is transformed into a rightful act. Second, the communications may contain serious injury to the petitioner Lanza. He might have revealed facts which could put him in jeopardy with serious penalties as a consequence. The privilege against self incrimination is affected. Thus, the very integrity of the relationship between the client and the attorney is at stake.

Once it is established that a constitutional right has been infringed by the recordings and the threatened use of them, it must follow that the judiciary has power to protect the right against everybody including a legislative committee. At least since *Marbury v. Madison*, 1 Cranch 137, has this Court invoked judicial power against legislative conduct that was deemed offensive to the Constitution. It has exercised control against the executive power in like circumstances.

The Right to Counsel.

Lanza was in jail awaiting charges against him as a parole violator resulting from a criminal prosecution.

He therefore was entitled to consult counsel. There is no question in any of the courts below, that Lanza had a right to counsel at this point. Indeed, each and every court below, aggregating 13 judges, emphatically denounced the intrusion into the confidential relationship and right to counsel. This right of counsel, the New York Court of Appeals held is so fundamental, that due process is denied when the conferences between attorney and client are intruded. *People v. Cooper*, 307 N. Y. 253, 259, cert. denied 315 U. S. 898; *Matter of Fusco*, 304 N. Y. 424, 433; *People v. Decina*, 2 N. Y. (2) 133.

See also, *Whiting v. Barney*, 30 N. Y. 330, for a history of the development of the privilege against disclosure of communications between attorney and client, where it was said (332):

> "But as parties were not then obliged to testify in their own cases, and could not be compelled to disclose facts known only to themselves, they would hesitate to employ professional men, and make the necessary disclosures to them, if the facts thus communicated were theirs within the reach of their opponent. To encourage the employment of attorneys, therefore, it became indispensable to extend to them the immunity enjoyed by the party."

This right to communicate with a client, free from compulsory disclosure extends to every type of communication made during the course of professional employment. In *Root v. Wright*, 84 N. Y. 72, 76, it was said:

> "The rule that an attorney cannot disclose communications made to him by his clients is not, as now understood confined to communications made in contemplation of, or in the progress of an action or judicial proceeding, but extends to the communications in reference to all matters which are the proper subject to professional employment."

It therefore follows that the privilege applied to Lanza although he was not at the time awaiting trial on a criminal charge.

The Right is a Federal One.

In *Powell v. Alabama*, 287 U. S. 45, it was held that an accused person had a right to consult with counsel not only at a trial but at all stages of preparation and assistance.

The Court also said (at 69):

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense."

See also, *Avery v. Alabama*, 308 U. S. 444.

In *Glasser v. United States*, 315 U. S. 60, 76, in speaking about the absolute right to counsel this Court said:

> "The right to have counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

In *Coplon v. United States*, 191 F. (2) 749, cert. denied, 342 U. S. 926, it was held that the interception of telephone conversations between attorney and client was an effectual denial of due process.

In *Caldwell v. United States*, 205 F. (2) 879, a secret agent for the government obtained employment with defense counsel from which position he transmitted defense information to the government. The Court held that there was no difference between intrusions by telephone as in *Coplon* from intrusions here. Nor was it necessary to show that actual prejudice had resulted to the aggrieved party.

In *United States ex rel. Cooper v. Denno*, 221 F. (2) 626, cert. denied 349 U. S. 968 (this was a further proceeding in the history of *People v. Cooper, supra*), a claim was made that a police officer was planted at a trial to overhear conversations in a foreign language between the accused and his attorney. The Court cited the *Glasser* and *Coplon* cases, *supra*, that it was not necessary to show prejudice to the accused in order to condemn such intrusion. The Court held however, that since due process is dependent upon the setting (citing *Betts v. Brady*, 316 U. S. 455, 462), there was a difference between intrusions that are surreptitious and those in a courtroom, where the conferees take the risk of being overheard.

See also, *re Bull*, 123 F. Supp. 389, where a letter written by a lawyer to a client in jail and intercepted by the jailor, could not be used as the basis for a disciplinary proceeding.

What has been said here is not affected by the recent case of *In re Groban*, 352 U. S. , 1 Law. Ed. (2) 376. In that case a federal right to counsel was denied to a person called before a fife marshal for a preliminary inquiry into the cause of a fire. Aside from the differences of kind and degree that exist between the examination in *Groban* and a person confined in jail, there is a radical distinction in the principle that governs. In *Groban* the question was whether the person required to testify could urge a right to assistance of counsel. Here, the question is may a government wilfully intrude upon the conversations of counsel and client, and thus, effectually destroy that right. To transpose that principle to *Groban*—could the State have intercepted an office conference between *Groban* and his attorney held prior to attendence at the fire marshal investigation? In the conference the client is entitled to speak without fear and also with freedom from self-incrimination.

In connection with *Groban*, it should not be overlooked that four justices (Warren, Black, Douglas, Brennan) dissented and that Justices Frankfurter and Harlan, while concurring in the Court's opinion, nevertheless, noted that due process rests upon differences even of degree in cases. The making of the recordings and the intended use of them by the State of New York is so outrageous and atrocious an invasion of the privacy of both the client and the attorney that at least four justices of this court can say that due process has been infringed.

In this connection reference is made to *Crooker v. California*, 707 Misc., Oct. Term, 1956, where on June 6, 1957, this Court granted certiorari limited to two questions, one of them being:

> "1. Was the defendant denied due process of law by the refusal of the investigation officers to allow him to consult with an attorney upon demand being made to do so while he was in custody?"

The Right Exists at Every Stage of a Criminal Proceeding.

As we have stated—none of the courts below hesitated to denounce the intrusions as an invasion of the right of counsel. As a prisoner in a jail, awaiting the outcome of a hearing concerning his parole status, Lanza had a right to consult with counsel. As was said in *Canizio v. New York*, 327 U. S. 82, 89—a person has a right to consult counsel at every stage and every step in a criminal proceeding.

As the Court observed in *People v. Cooper*, 307 N. Y. 253, 259:

> "The right to counsel, based on fundamental principles of justice, is inherent in the concept of a fair trial (see, e. g., *People v. McLaughlin*, 291 N. Y. 480, 482; *Williams v. Kaiser*, 323 U. S. 471,

473), and included therein, of course, is the right to consult counsel in private, without fear or danger that the people, in a criminal prosecution, will have access to what has been said either openly, by forcing the attorney to divulge what he has learned, or secretly, by the use of a concealed recording device or the planting of a human eavesdropper. (See *Matter of Fusco v. Moses*, 304 N. Y. 424; *Coplon v. United States*, 191 F. 2d 749, certiorari denied 342 U. S. 926.) Intrusion upon a client-lawyer conference, whether in the privacy of an office or at the counsel table in court, contravenes our sense of traditional fair play and due process and is particularly offensive where defendants have sought to keep their conversations and communications secret and confidential by resort to a foreign language. To cull from what was said in *Coplon v. United States* (*supra*, 191 F. 2d 749, 759, certiorari denied 342 U. S. 926). 'The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel.' "

The fact that the confidential talks have already been overheard does not change the principle of the right to consult counsel privately. It is not a question that the secret communication has already been revealed. In *Cooper, Decina* and *Fusco*, the secrets came in the possession of third persons, yet the convictions were voided for that very reason. Furthermore, as the *Glasser* case, *supra*, admonishes us—a Court cannot indulge in nice calculations as to how much prejudice has resulted from a denial to the right of counsel.

That this is an action for injunction does not change the principle involved. As was recently pointed by this Court in *Kingsley Books Inc., v. Brown*, 1 L. Ed. 2d 1469 that injunction is another weapon to attain an objective. In this case, it is the only weapon petitioners have to prevent irreparable injury, and at the same time vindicate the integrity of the relationship between attorney and client.

There can be no doubt that on the basis of the *Cooper*, *Fusco* and *Decina* cases (*supra*), the New York courts would have voided any judgment in any proceeding against Lanza based on disclosures from these intrusions. Therefore, the question arises: Is there any distinction—bearing in mind that the right of counsel is the issue—between a judgment against Lanza after a hearing, in which the intrusion is revealed and a suit by Lanza to avoid publishing the ill-gotten contents of such instrusions, and to prevent irreparable damage to himself? The answer is there is no difference in principle. In both, he is seeking to protect his right to counsel. If an intrusion occurs during and before trial of an accusation, the aggrieved person can object. Here, however, he has no other form of redress, except by affirmative action, such as injunction. In the case where a judgment in a prosecution is voided, it is voided not because of any infirmity in the substantive merits of the action, but rather to protect the right to counsel—called due process. The protection is afforded by the denial of the benefit of the unlawful act to the intruder or to those deriving from him. By voiding of the judgment, it is hoped that such actions would be discouraged. At least, the judiciary does not wish to be a party to such ignoble conduct of the sovereign.

See also, *Rea v. United States*, 350 U. S. 214, 100 L. Ed. 213, where an injunction was granted restraining a federal officer from testifying in a State court prosecution with relation to property he had seized unlawfully.

This case is unlike *Stefanelli v. Minard*, 342 U. S. 117. In that case an injunction was denied in an action brought under the Civil Rights Act. This Court refused to restrain the use in a State court prosecution of evidence obtained by an unlawful search and seizure. The distinguishing factor is that there, a prosecution was pend-

ing and under the applicable State procedure, the evidence was admissible. Here, however, not only is a prosecution lacking, thus leaving injunction as the sole remedy, but also, here, we have a case of the violation of the fundamental right to counsel. Although New York allows in evidence even unlawfully seized items, nevertheless where evidence was unlawfully obtained by intrusion into the relation between attorney and client, a conviction cannot stand. *People v. Cooper, Matter of Fusco, supra.* Therefore, the *Stefanelli* doctrine could not apply here.

To Permit the Use Would be a Denial of Due Process.

This is not a case such as *Wolf v. Colorado,* 338 U. S. 25. In that case this Court recognized that the Fourteenth Amendment protects against an unreasonable search and seizure by a State officer. Yet, the Court held that evidence unlawfully seized could be admitted in evidence in a State trial. There, the question was admissibility alone. Here, the question is one of broader scope and more fundamental. It concerns effective representation by counsel. If a prisoner cannot talk to counsel, the right is defeated.

This case falls into the type of invasion of privacy which was condemned in *Rochin v. California,* 342 U. S. 165. There, this Court held that due process is not accorded when conduct by public officials against citizens "shocks the conscience," and "offend a sense of justice." Thirteen state justices have expressed their revulsion against the conduct of the acts of recording the conferences. To them, as undoubtedly to the members of this Court, and the community, the conduct shocks the conscience. In *Rochin* the Court observed, "All the California judges who have expressed themselves in this

case have condemned the conduct in the strongest language." The parallel with this case is marked.

Even the New York courts as illustrated in the *Cooper*, *Fusco* and *Decina* cases, *supra*, recognize the difference. New York abides by the *Wolf v. Colorado* doctrine (*People v. Defore*, 242 N. Y. 13). Yet, in the cases of invasion of professional privacy it nullified the convictions.

In the recent case of *Breithaupt v. Abram*, 352 U. S. , 1 L. Ed. 2d 448, this Court, although it factually distinguished the acts there as not shocking, nevertheless, reiterated the doctrine of the *Rochin* case. The dissent of Mr. Justice Douglas pointed out that in *Leyra v. Denno*, 347 U. S. 556, this Court recognized that nonviolent methods could also operate to deny due process.

The present case also fits into rationale expressed by Mr. Justice Black in *Rochin*. Here, the petitioner Lanza has been placed where his right to be free from self-incrimination has been defeated. It is not necessary at this point to urge that *Adamson v. California*, 332 U. S. 46, was wrongly decided in withholding the Fifth Amendment's privilege in State prosecutions. It is sufficient to suggest that the recorders of the conversations were not merely indulging themselves idly. Their purpose undoubtedly was to obtain evidence or leads that could be used against Lanza. For all we know, Lanza might have made revelations to his attorney that might subject him to prosecution in a *Federal* court. See, *Slochower v. Board of Higher Education of the City of New York*, 350 U. S. 551; *Quinn v. United States*, 349 U. S. 155.

This Court Has Power to Enjoin a Legislative Committee.

It is inescapable that the jailors who made the recording and the respondents, the legislative committee are

both part of the same governmental machinery that comprises the sovereignty known as the State of New York. it is incredible that an attempt should be made to divide them into a dichotomy, so that the Committee may sanctimoniously say that the jailor's act was outrageous, but it is free to use the recording because it is innocent of the outrage. This makes a mockery of reality. Neither one is free from condemnation. By availing itself of the wrongfully obtained fruits of the intruder, the Committee is a partner in this assault on the professional relationship. It is putting to use what another governmental agency has unlawfuly obtained. Since due process acts against the conduct of the State it is not necessary to atomize the various departments of the State to find the wrongdoer, cf. *Dreyer v. Illinois*, 187 U. S. 71. It is the State that is doing the wrong, and it is the State that the constitution holds responsible to furnish due process.

Once it is established that due process is being denied by a State can there be any question that this Court has ample power to enforce the constitution? Is there anyone, executive, legislator or judge who may deny a right protected by the constitution without being subject to the power of this Court?

The answer is that at least since *Marbury v. Madison*, 1 Cranch 137, it has been established doctrine that an unconstitutional act by a legislature—even after passage by both houses and approved by the governor—may be voided as incompatible with the Constitution of the United States.

Indeed, in *Youngstown v. Sawyer*, 343 U. S. 579, this Court enjoined the President of the United States from seizing and operating steel plants (see also concurring opinion of Justice Frankfurter at pages 595-596, with relation to the injunctive power where a federal right is

invoked). This power extends against the officers of the government, including cabinet members, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. See also, *Panama Refining Co. v. Ryan*, 293 U. S. 388; *Work v. Louisiana*, 269 U. S. 250.

To sustain this Court's power to inhibit a constitutional transgression, it is not necessary to show that the power is brought into play through the exercise of affirmative authority granted to the judiciary (cf. Frankfurter, J., in *Watkins v. United States*, 1 L. Ed. 2d 1273, 1300). For instance, in *Jurney v. MacCracken*, 294 U. S. 125, Congress exercised its own power to punish a witness for contempt, without the intervention of the judiciary. Yet, this Court reviewed the action of Congress through *habeas corpus*, against the Sergeant-at-Arms of the Senate. It was the only remedy available to the prisoner. That case is an additional authority to sustain the principle that the judiciary may intervene against anyone including a House of Congress when claim is made of the denial of a constitutional right. That the *habeas corpus* proceeding was directed against an officer of that House does not obscure the reality that it was an application for a writ to undo what the Senate had done. The challenge there was to the power of the Senate to sit in judgment in such a case. It therefore follows, that an action for an injunction against individual members of the Committee and its counsel, although an independent remedy, is nevertheless appropriate.

The petitioners are not attempting to interfere with the right of the legislature to enact laws. All they are seeking is to prevent public use of the illegally obtained recordings. The legislature can legislate without the recordings. As Judge Desmond pointed out below, "If there is anything in this eavesdropped conversation which can aid the Legislature in performing its legislative func-

tions the members of this Committee, having already read this transcript, can form conclusions and transmit them to the Legislature. It is difficult to see how any proper legislative purpose can be served by broadcasting this confidential material." In seeking the relief here there is no interference in the discharge of legislative duties.

The case of *Hearst v. Black*, 87 F. 2d 68, is not decisive, since it was not reviewed by this Court. Moreover, it does not involve the integrity of the relationship between attorney and client. In due process cases, differences of degree are crucial.

In giving support for this argument, this Court will but reiterate what is common doctrine—that no person is beyond the reach of the law, especially when constitutional rights are being impaired. There is no immunity from such restraints for legislators or any public officer, for even New York law reaches out to enjoin them individually, *Pauchogue Land Corp. v. State Park Commn.*, 243 N. Y. 15. All who infringe a constitutional guarantee may be controlled by the courts.

A State court must provide a remedy to redress the invasion of a constitutional right. *Mooney v. Holohan*, 294 U. S. 103, 112, 113; *Moore v. Dempsey*, 261 U. S. 86, 90; *Herbert v. Louisiana*, 272 U. S. 312, 316. The failure to furnish a remedy, as was done here, by a plea of lack of power in the judiciary, in itself raises a federal question that should be resolved in favor of petitioners.

In the recent cases of *Watkins v. United States*, 1 L. Ed. 2d 1273 at 1274, and *Sweezy v. New Hampshire*, 1 L. Ed. 1311 at 1327, it was emphasized that the Bill of Rights affords protection even against transgressions by legislative committees. True, in that case the issue was formulated in an appeal from a judgment of con-

viction for contempt. If petitioners had been compelled to testify before the respondent Committee with respect to these recordings, the *Sweezy* case would have applied. Since the protections of the Bill of Rights can be obtained here only by way of injunction, it follows that the remedy applies against a legislative committee to secure such protection.

What becomes of the constitutional right if this Court should disavow its powers? An attorney could not consult with his client in a jail. No lawyer with perception would feel free to speak there. It would be followed by instance after instance of cases such as illustrated in the *New York Times* incident. Should a Trial Court in its discretion deny a conference outside of jail, then the alternative would be a claim of denial of the right to counsel.

Respectfully submitted,

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Counsel for Petitioners.

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APPENDIX A.

Opinions in the Court of Appeals.

FROESSEL, J. Plaintiffs, an attorney and his alleged client, brought this action to restrain defendants, a New York State Joint Legislative Committee, its chairman and counsel, from "using" or divulging a communication said to be confidential and contained in a recording thereof illegally obtained, and for related relief. At the same time, plaintiffs moved for a temporary injunction for the same relief. Defendants cross-moved to dismiss the complaint for lack of jurisdiction and for legal insufficiency under subdivisions 1 and 4 of rule 106 of the Rules of Civil Practice. Special Term, New York County, by two separate orders, granted the injunction *pendente lite*, and denied defendants' cross motion. The Appellate Division unanimously reversed both orders, granted defendants' cross motion to dismiss, and denied the motion for a temporary injunction.

Plaintiffs in their complaint allege, among other things: That the defendant, New York State Joint Legislative Committee on Government Operations, was duly created in 1955* by the Legislature of the State of New York to investigate and examine the management of any State department, board, bureau, commissioner or other agencies of the State; that said committee was empowered by the Legislature to make studies, among other things, of the operation of State government with a view towards determining its economy, efficiency and effectiveness administration of State laws and the detection and prevention of unsound, improper or corrupt practices; and was authorized to exercise the powers granted to legislative committees by the provisions of the Legislative Law. That in February, 1957 the committee undertook to in-

* The exceedingly broad powers of this committee, consisting of eight members, four members of the Senate and four of the Assembly, will be found in N. Y. Legislative Index (1955, p. 604).

vestigate the facts and circumstances concerning the parole violation of plaintiff Joseph Lanza. On April 26, 1957, an announcememnt appeared in the newspapers to the effect that the committee would hold public hearings beginning on April 29th, in the course of which it would make public a certain recording of conversations between Cosentino and his client Lanza, which had come into its possession, and which plaintiffs claim was made without their knowledge or consent. The recording is alleged to have been made on February 5th and 6th in the counsel room of the Westchester County Jail when no one else was present.

Some of the foregoing allegations are contradicted in the affidavits submitted by defendants in opposition to the motion for a temporary injunction. It is true, as referred to in Judge DESMOND's opinion, that the committee counsel stated upon the argument that the intentional secret interception of a confidential communication between attorney and client in the counsel room of a prison is repugnant, but it is also true that he offered to the court the minutes of the committee's hearing which, he stated, would demonstrate beyond doubt that this simply did not take place here. Because of the objection by plaintiffs' attorney, we were not permitted to examine these minutes. Whatever the actual facts may be, however, we are required, on a motion attacking the complaint on its face, to assume its allegations to be true (*Denihan Enterprises* v. *O'Dwyer*, 302 N. Y. 451, 458; *Blanshard* v. *City of New York*, 262 N. Y. 5, 12).

The primary question presented to us is: May the New York State Joint Legislative Committee on Government Operations, an arm of the State Legislature, one of the three co-ordinate branches of our State government, and its named representatives, be enjoined by the courts from making a part of its record at a public session a tape recording and transcript, now in its possession, of an

alleged private conference between Lanza and Cosentino while in a local county jail? It is not denied that the subject matter of this tape recording is within the scope of this committee's inquiry.

Plaintiffs contend that the use and divulgence of the recording in question violate the privilege between attorney and client afforded by the provisions of section 353 of the Civil Practice Act, and impair the client's constitutional right to counsel. The attorney-client privilege is of common-law origin (8 Wigmore on Evidence [3 ed., 1940], § 2290 et seq.; *Whiting* v. *Barney*, 30 N. Y. 330), and as adopted by the people of this State is now embodied in sections 353 and 354 of the Civil Practice Act. Section 353 merely provides that an attorney (and his employees) "shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment." Section 354 states: "The last three sections apply to any *examination of a person as a witness* unless the provisions thereof are expressly waived upon the *trial or examination* by the * * * client." (Emphasis supplied.) Thus the statute seals the lips of the attorney and affords a privilege against *testimonial compulsion*, unless waived by the client. In other words, it forbids the disclosure of such evidence by an attorney (and his employees) when examined as a witness. So it has been held with respect to physicians, who "are accorded the same statutory recognition, sanction and protection" as attorneys (*Matter of New York City Council* v. *Goldwater*, 284 N. Y. 296, 300; *Buffalo Loan, Trust & Safe Deposit Co.* v. *Knights Templar & Masonic Mut. Aid Assn.*, 126 N. Y. 450). If either should in conversation disclose such secrets, he would, we said in the last-cited case (p. 455), "violate no statute, however reprehensible his conduct would be."

The statute does not inhibit disclosures by other persons who have overheard the conversation (*Cary* v. *White*, 59 N. Y. 336, 339; *Erlich* v. *Erlich*, 278 App. Div. 244; *Sparer* v. *Travelers Ins. Co.*, 185 App. Div. 861; *Hobbs* v. *Hullman*, 183 App. Div. 743; see *People* v. *Decina*, 2 N. Y. 2d 133, 144; *Baumann* v. *Steingester*, 213 N. Y. 328; 8 Wigmore on Evidence [3d ed., 1940], §2326; 58 Am. Jur., Witnesses, § 365; Richardson on Evidence [8th ed.], § 438). It follows that when neither the attorney nor the client is examined as a witness, the statute does not create a right to prevent the disclosure of a confidential communication, and accordingly does not authorize a cause of action for an injunction.

The committee in the instant case does not seek to compel the attorney or the client to testify as to the confidential communication and is not, as in *Matter of New York City Council* v. *Goldwater* (*supra*), invoking the power of the court to compel plaintiffs or anyone else to disclose information they are forbidden to disclose. It is seeking to make a part of the public record of its investigation information which has come to it in the course thereof.

Of course, we agree with the courts below that the secret recording of the conversations in the manner alleged in the complaint was an unreasonable interference with Lanza's right to confer privately with counsel (see *People* v. *Cooper*, 307 N. Y. 253; *United States ex rel. Cooper* v. *Denno*, 221 F. 2d 626, cert. denied 349 U. S. 968; *Atlmayer* v. *Sanford*, 148 F. 2d 161). However, that is not the issue here; it is the "use" of the recording that is sought to be enjoined. The interference by undisclosed persons has already taken place. It is clear that if such interference had occurred in connection with a proceeding directed against Lanza, any resulting determination would be annuled by the courts on the ground that the interference with his right to counsel had destroyed his

constitutional right to a fair trial (*Matter of Fusco* v. *Moses*, 304 N. Y. 424, 433-434; *People* v. *McLaughlin*, 291 N. Y. 480, 482-483; *Caldwell* v. *United States*, 205 F. 2d 879, 881; *Coplon* v. *United States*, 191 F. 2d 749, 757-760, cert. denied 342 U. S. 926; see *People v. Cooper, supra*, pp. 259-260).

Thus, where in the course of a criminal trial the defendant's right to confer privately with his counsel has been violated, the trial is vitiated (*People* v. *McLaughlin, supra*; *Caldwell* v. *United States, supra Coplon* v. *United States, supra*, see *People v. Cooper, supra*). The same rule was applied to set aside a determination of an administrative body where persons accused of corrupt dealings were dismissed after a hearing in the course of which their right to counsel had been denied (*Matter of Fusco* v. *Moses, supra*).

Here it is not claimed that the recording will be used in connection with any action or proceeding directed against Lanza—we merely have a legislative investigation and its findings are binding on no one. Lanza's right to a fair trial is in nowise being impinged upon since there is no trial, present or prospective. None of his property rights is involved. Consequently, the use and disclosure of the communication, unconnected with any proceeding directed against Lanza, as distinguished from the act of recording, is not a basis for an injunction action.

The legislative committee's hearings here involved are not directed against Lanza but are conducted in furtherance of a legitimate legislative object by express authorization of the Legislature itself pursuant to law. Such power of inquiry is an essential auxiliary to the legislative function (*Matter of Joint Legislative Comm. to Investigate State Educ. System* [*Teachers Union*], 285 N. Y. 1, 8; *McGrain v. Daugherty*, 273 U. S. 135, 174 *et seq.*).

No contention is made that the information sought to be used is not relevant to this purpose, and in such case

the judiciary would be usurping authority if it enjoined the legislative branch of our government, in the exercise of its constitutional functions, from using and making a part of its public record the information from the recording involved here. In *Hearst* v. *Black* (87 F. 2d 68), a Senate committee had obtained physical possession of copies of telegrams which had been taken illegally from the telegraph company's offices. It was sought to restrain the committee "from keeping the messages or making any use of them or disclosing their contents." The court distinguished between the act of illegally seizing the telegrams and their later use and disclosure by the committee, and held that a court of equity has no authority to restrain the latter acts, adding (p. 71) that the universal rule "is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference". (See, also, *Nelson* v. *United States*, 208 F. 2d 505, 513, cert. denied 346 U. S. 827; *Barsky* v. *United States*, 167 F. 2d 241, 250, cert. denied 334 U. S. 843; *Matter of Joint Legislative Comm. to Investigate State Educ. System* [*Teachers Union*], *supra*.)

We can find no authority, constitutional or statutory, empowering the courts to enjoin the Legislature in the assumed fact pattern of this case. To claim inherent power here is nothing more than an assumption of power on the part of one branch of the government as against a co-ordinate branch. This we decline to do. The Legislature is as much a guardian of the liberties of the people as are the courts. We will not assume that the legislative committee will disregard its duty toward any individual who may in anywise be referred to in its public hearings. Indeed, we do not know whether the allegations of the complaint are in fact true. The committee has had extended hearings and has taken substantial evidence. It is in a position to determine the underlying

facts on which it will base any action it may take. The responsibility for such action is that of the committee and the Legislature.

Accordingly, we hold that the drastic remedy of injunction does not lie in this case, and that no sufficient cause of action is stated in the complaint. The judgment appealed from should be affirmed, and the appeal from the order denying the temporary injunction should be dismissed.

DESMOND, J. (dissenting). Defendants are a New York State Legislative Committee authorized to investigate the operations of the State departments, and the committee's counsel, all defendants being sued individually and as officials. Plaintiff Cosentino is a lawyer and according to the complaint was acting as lawyer for coplaintiff during an interview with the latter with no one else present in the counsel room of the Westchester County Jail. According to the pleading, the defendant committee has announced that it has, somehow or other, gotten a recording of that supposedly secret and sacredly confidential lawyer-client conversation and intends to make it public. Plaintiffs bring this suit for an injunction against such disclosure. Special Term denied a motion to dismiss the complaint and granted a temporary injunction. The Appellate Division, although it characterized the recording of an attorney-client interview as "a gross and inexcusable violation", found itself powerless to interfere, and reversed the temporary injunction and dismissed the complaint. Since a temporary injunction grant or denial is not appealable or reviewable here, the only question before us is as to the sufficiency of the complaint to state grounds for relief against this threatened wrong.

Under familiar rules, the allegations of the complaint must at this stage be taken as true. Under equally

familiar rules, the complaint must be held sufficient if, liberally construed, it states in some recognizable form a cause of action known to the law (*Howard Stores Corp. v. Pope*, 1 N. Y. 2d 110, 114, and cases cited). We must keep in mind that at this point in this court plaintiffs, alleging that they are about to be injured irreparably and that they have no protection except an injunction, are asking us for no more than a trial. To accept as true their pleading of what is admittedly a gross wrong and then to turn them away without even a trial is confession by this court of futility an impotence.

On the argument before us the committee's counsel agreed that the secret interception of a confidential exchange between lawyer and client is "repulsive and repugnant" but that the committee nevertheless intends to make public this transcript. Counsel told us in open court that the secret "bugging" of the jail room was done by officials of Westchester County, a subdivision of the State. We are, therefore, officially informed that both the eavesdropping and the threatened divulgence are by agencies of the State of New York. It is argued, however, that the lawyer-client privilege extends to testimonial compulsion only and in any event does not bar third persons from disclosing what they have overheard (Civ. Prac. Act, § 353; see Richardson on Evidence [8th ed.], § 438). If we had here no more than a question of admission or exclusion of evidence, we might reluctantly say that the eavesdropped material could be testified to by its possessor. But such an approach misses the main joint entirely. What plaintiffs are complaining of is a threatened violation of their fundamental constitutional right. A way should be found to raise a judicial bar against such a wrong.

Scrupulously we eschew interference with the functioning of the Legislature. This court will not enjoin legislative action as such regardless of judicial views as to its

legality. But the protection of a citizen's constitutional rights is a court function and no public official or body is beyond the reach of that judicial power (*Youngstown Co.* v. *Sawyer*, 343 U. S. 579). If the President of the United States can be stayed by the courts from seizing the steel mills during a national emergency, a New York State Legislative Committee can be enjoined from a gross violation of a citizen's personal rights, no less valuable, certainly, than Youngstown's property. Years ago this court rejected an assertion by the Attorney-General that "the exercise of a discretion reposed in him as an executive official by the Legislature cannot be supervised or controlled by the courts" (*Carlisle* v. *Bennett*, 268 N. Y. 212, 217). In rejecting that claim of unbridled power this court said that "there are limits to the power of the Legislature" and that it "could not confer upon an executive an arbitrary and unbridled discretion as to the scope of his investigation". No more could it make such a conferral on this defendant committee.

There is another compelling reason for asserting judicial power here. Our traditional system of trial and appeal in criminal cases simply cannot be operated unless lawyer-client interviews in jails and prisons have absolute privacy. Persons accused of crimes and not bailed (see Code Crim. Pro., § 552) or accused of parole violations (Correction Law, §§ 216-218) cannot consult counsel anywhere except in jails and prisons. Such consultion under appropriate conditions (see *People* v. *McLaughlin*, 291 N. Y. 480) is essential to the protection not only of defendants but of the institution of public justice. Eavesdropping and disclosure will destroy the institution itself.

The individual defendants are sued as State officers and individually. Regardless of whether the State or the Legislature or the committee as entities could be enjoined here, there is ample precedent for an injunction against the legislators and their counsel, as such individuals

(*Pauchogue Land Corp.* v. *Long Is. Park State Comm.*, 243 N. Y. 15; *Niagara Falls Power Co.* v. *White*, 292 N. Y. 472, 478; *Erie R. R. Co.* v. *Sells*, 298 N. Y. 58, 61). No men, whatever their offices, can escape individual responsibility for acts done without power or right.

That the citizen's right to counsel is fundamental and that it includes private consultation with an attorney of his choice is settled beyond cavil in this court (*People* v. *McLaughlin*, 291 N. Y. 480, *supra*; *Matter of Fusco* v. *Moses* 304 N. Y. 424; *People* v. *Cooper*, 307 N. Y. 253, 259). According to this complaint and by concession of defendants, that right has been violated here. What measure of damage its further violation will do to plaintiffs we cannot know without a trial. We do know from the complaint that plaintiff Lanza is charged with being a parole violator. We cannot speculate as to what prejudice may befall him from the publication of his confidential talks with his lawyer. If the facts are as they appear from the complaint, such a publication will be grieviously wrong. The courts should do their duty by holding a trial and by granting such relief, interim and permanent, as may be appropriate.

The only proper and legal purpose of legislative investigations is to gather facts in aid of future legislation. If there is anything in this eavesdropped conversation which can aid the Legislature in performing its legislative functions the members of this committee, having already read this transcript, can form conclusions and transmit them to the Legislature. It is difficult to see how any proper legislative purpose can be served by broadcasting this confidential material.

The judgment should be reversed, with costs, and the motion to dismiss the complaint denied.

Dye, J. (dissenting). I dissent and vote to reverse on all the grounds stated by Desmond and Fuld, JJ., to which I wish to add the following: In this controversy we

deal with a problem that, under ordinary circumstances, would be relatively simple—does the complaint state a cause of action? I say relatively simple for if under a fair reading of the allegations it appears that the commission of the threatened act, or a continuance thereof, would produce injury to the plaintiff he is entitled to have it restrained. However, in this instance the nature of the relief sought, and the parties litigant, combine to complicate the situation by posing a threshold question which strikes at the very fundamentals of orderly government. To state it simply and concisely, may judicial authority be invoked to restrain the Legislature from committing an irreparable injury to a personal right long known to the common law, embodied by implication in our State Constitution and codified into our statutes as section 353 of the Civil Practice Act?

Here, as we know, a conversation between a parole violator and his attorney was surreptitiously obtained by the use of an electronic recording, while they were using the counsel room in the Westchester County Jail, and has since come into the hands of the defendants. This conversation the defendants threaten to make public, an action they justify on the broad general theory that it is a part of the public record made in the course of its investigation into "the operation of the State Government * * * administration of the laws and the detection and prevention of unsound, improper or corrupt practices".

Our problem is simplified in great measure by the circumstance that for the purpose of this appeal (1) it is deemed that the subject matter of the recorded conversation is within the scope of the committee's inquiry, and (2) that the relationship of attorney and client exists.

We all agree that section 353 of the Civil Practice Act securely seals the lips of an attorney and affords privilege against testimonial compulsion unless waived by the client.

In the courts below and in the majority opinion, it is pointed out that the protection does not extend to persons who have overheard the conversation. However, we deal here with a conversation obtained by means of an electronic device, the use of which was carefully concealed, was surrepetitious and wholly unauthorized by law. Furthermore, the use of it was at a time and place deemed inviolate to intrusion by others—the sanctity of a counsel chamber during an interview between an attorney and his client.

As I see it, the ancient rule that conversations had in the presence of third persons breaks the seal of privilege—absent a waiver of the privilege by a client—has no relevance when the conversation is unlawfully intercepted by a concealed recording device. Under such circumstances the application of the rule takes on a new significance. A concealed electric device is not a third person in any sense of the word and transcription of the intercepted material does not change its status. In that view the third person exception has no application to this situation. The privilege survives the intrusion. Nor does the fact that this recording is not for use in the course of a trial, but for use in connection with a duly authorized legislative inquiry, operate to bar the privilege. There is a vast difference between the use of material obtained by unlawful search and seizure, and the use of a surreptitious recording of a conversation between a client and his attorney. A search may be had on a proper showing—in only one case may the seal of confidence between a client and his attorney be broken and then only by the client—for unless so waived the court is otherwise powerless to obtain it. The co-ordinate branches of government have no greater or different power in this regard.

It has been asserted that the seal is broken in this instance by the circumstance that the recording was made

by a department of the executive branch and by them turned over to the Legislature, and that under the circumstances the courts are powerless to act. This is not so—the laws of the State apply with equal vigor to all members of society—not only to the citizen in his relation to his government, but to officials in the discharge of their duties in behalf of the citizen. The executive and legislative branches, no less than the judicial, are subject to the mandates and the obligations of the law. It has often been said that ours "is a government of law and not of men". Now the Constitution, so far as I have been able to ascertain, makes no exception; by strong implication the rights of the individual are paramount—being subordinated only to the overriding needs of the general welfare. True, the Constitution does not in so many words make inviolate the confidences of a client and his attorney. However, in order to make certain that the constitutional mandate that no person shall be deprived of life, liberty and property without due process of law (N. Y. Const., art. I, § 6) have effect, the Legislature in its wisdom codified into the State law (Civ. Prac. Act, § 353) an absolute privilege. This salutary provision is a solemn declaration of State policy which all connected with the administration of government are duty bound to observe and make operative—there is no exception.

I submit that just as the courts are bound, so too are the legislative and executive branches of the government—the safeguards provided by law may not be flouted by either. It is a clumsy subterfuge to say that, because the inquiry is not judicial in nature, the Legislature is not bound to observe fundamentals in the discharge of its legislative function. Nothing could be further from the mark. When the citizen's rights are disregarded, our cherished freedoms will end and the government will cease to exist "of, for and by the people".

Several landmark cases have been pointed to in which the courts have intervened to protect the citizen in his property rights, including the restraint of a President of the United States. As a matter of simple truth, personal rights are of equal importance. The Constitution says so and that truth has now become part of our great tradition—the correctness of which is no longer open to challenge. The privilege attached to a conversation between a client and his attorney is as fundamental as anything can be in the administration of government.

The separation of powers is stressed to furnish a basis for creating an exception to the public policy enunciated in section 353. It has been said that the Legislature, whenever it sees fit, may abolish the privilege by repealing or amending the statute—an event which I am sure no member of any Legislature would ever sponsor and, if sponsored, would not support.

We must not lose sight of the undisputed fact that the conversation sought to be publicized was between a prisoner incarcerated in a jail and his attorney. Ostensibly, the prisoner could converse with his lawyer freely, confidentially and in private, without fear of reprisal. As it turns out he had neither freedom, confidentiality or privacy. To "bug" a conversation under such circumstances may not be excused under the guise of prison security. To say so is an affront to the members of the Bar and is a reproach to our governmental system, for to do so is in clear violation of the announced public policy of the State. Lawyers, we must remember, are officers of the court. To sanction disclosure of conversations had with the client—unless waived—strikes at an institution which is far more sacred than the need that legislative inquiries be public. The complaint, as I read it, states a cause of action.

The judgment appealed from should be reversed and the motion attacking its sufficiency should be denied.

FULD, J. (dissenting): I, too, am for reversal, for I do not believe that the courts of this state are helpless to prevent the consummation of a practice so offensive and repugnant as the one disclosed by the papers before us.

It is quite true that in this state evidence, though illegally obtained, is admissible, and it is also true that the statutory provision which protects from disclosure client-attorney communications is aimed at the attorney and not at third persons who may have overheard or learned what transpired at the privileged conference.[1] But in this case we deal with something quite different, something quite unprecedented. In other cases that have arisen, the evidence was potentially admissible; it could have been obtained properly by means of a search warrant or by means of an order permitting interception of telephonic communications. That is not true of the "evidence" with which we are now concerned; here, a search warrant could not possibly have been procured to obtain such evidence, and no order could possibly have been obtained to tap a lawyer's telephone and permit the interception of communications between such lawyer and a client in order to intrude upon privileged conversations.

It cannot be too strongly emphasized that this is not the simple case of a third person eavesdropping on two people who, in this telephonic and electronic age, might be expected to anticipate interception and recording of their conversations. This is a case where the state, or one of its subdivisions, actually invited an attorney into a room so that he and his client might carry on their confidential business in private—indeed, there was no

1. It is noteworthy that the National Conference of Commissioners on Uniform State Laws have proposed a rule which brings within the sweep of the client-lawyer privilege the testimony of any witness disclosing a communication between client and lawyer "if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client". (Handbook of National Conference of Commissioners on Uniform State Laws [1963], rule 26, p. 179.)

other place where the client could consult with counsel—and, despite the invitation and despite the more basic guarantee of privilege and confidentiality granted by statute, recorded what was said and then, some time later, turned the record over to another branch of state government. It cannot be the law that the state may be a party to such a practice and urge that nothing may be done, when the recording is sought to be introduced into evidence, to prevent disclosure and publication of its contents.

Although I have come on no case involving an occurrence similar to that before us, and that, of course, is readily understandable, this court has had occasion to consider and condemn occurrences not too unlike it and, in my view, those decisions require a reversal and a judgment sustaining the complaint. (See *People v. Cooper*, 307 N. Y. 253, 259; *Matter of Fusco* v. *Moses*, 304 N. Y. 424; see, also, *Coplon* v. *United States*, 191 F. 2d 749.) In these cases, the asserted impropriety occurred during the pendency of a hearing or a prosecution against the client, while in the present case no litigation was pending against the client when the prison authorities recorded his talk with his lawyer. However, the client was then actually under investigation by the parole authorities, if not by other agencies, and, accordingly, the intrusion upon the conference, supposedly private and secret, constitutes the interference and invasion of a person's right to counsel which the courts have always condemned. I repeat what this court declared in *People* v. *Cooper* (*supra*, pp. 259-260), "Intrusion upon a client-lawyer conference, whether in the privacy of an office or at the counsel table in court, contravenes our sense of traditional fair play and due process and is particularly offensive where defendants have sought to keep their conversations and communications secret and confidential * * *. To cull from what was said in *Coplon* v. *United States*

(*supra*, 191 F. 2d 749, 759, certiorari denied 342 U. S. 926), 'The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel.' "

Once it be decided that disclosure and publication of the recorded client-attorney communication impinge on fundamental guarantees, it cannot be that our courts are powerless to prevent the contemplated action. It is to the people of the state that the judiciary owes a duty, and it must ever be alert, to restrain incursions on rights fundamental to individual freedom. Accordingly, when members of a committee of the legislature, in the conduct of a public hearing, misconceive constitutional or basic principles, a court cannot, when its jurisdiction is invoked, refuse to voice an opinion or decline to take action appropriate to the situation presented, however much it may differ from that of the committee.

I would add one further thought in view of a contention advanced by the defendants. It may well be that the communication between the plaintiffs was not privileged, that either there was no relationship between them of client and attorney or, if there was such a relationship, the subject matter was such as to deprive the communication of the privilege and cloak of confidentiality. However, on the strength of the allegations of the complaint, which must be considered as true at this stage of the litigation, we deal with a true client-attorney relationship and a communication unquestionably protected.

The judgment dismissing the complaint should be reversed.

CONWAY, Ch. J., VAN VOORHIS and BURKE, JJ., concur with FROESSEL, J.; DESMOND, DYE and FULD, JJ., dissent in separate opinions in which each concurs.

Upon appeal from judgment: Judgment affirmed.

Upon appeal from order denying temporary injunction: Appeal dismissed.

APPENDIX B.

Judgment of Court of Appeals.

COURT OF APPEALS

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 24th day of May in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

Witness,

The Hon. Albert Conway,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur May 24, 1957.

No. 153.

JOSEPH LANZA & ANO.,
Appellants,

vs.

NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, Individually and as Chairman, ARNOLD BAUMAN, Individually and as Chief Counsel,
Respondents.

BE IT REMEMBERED, That on the 18th day of May in the year of our Lord one thousand nine hundred and

fifty-seven, Joseph Lanza & ano., the appellants in this cause, came here unto the Court of Appeals, by Edward H. Levine and Michael P. Direnzo, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the First Judicial Department.

And New York State Joint Legislative Committee on Government Operations, William S. Horan, Individually and as Chairman, Arnold Bauman, Individually and as Chief Counsel, the respondents in said cause, afterwards appeared in said Court of Appeals by Boris S. Berkovitch, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Edward H. Levine, of counsel for the appellants, and by Mr. Arnold Bauman, of counsel for the respondents, brief filed by *amicus curiae*, and after due deliberation had thereon, did order and adjudge that upon appeal from judgment: the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed. Upon appeal from order denying temporary injunction; the appeal herein be and the same hereby is dismissed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that upon appeal from judgment; the said judgment be affirmed. Upon appeal from order denying temporary injunction; the said appeal be dismissed, as aforesaid.

Judgment of Court of Appeals

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

Filed
June 4-1957
New York County Clerk's Office

APPENDIX C.

Certificate of Court of Appeals.

In

COURT OF APPEALS,

STATE OF NEW YORK.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the third day of July, A. D., 1957.

Present:

Hon. Albert Conway, Chief Judge, Presiding.

Mo. No. 283

JOSEPH LANZA & ano.,
Appellants,
vs.
NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, Individually and as Chairman, ARNOLD BAUMAN, Individually and as Chief Counsel,
Respondents.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Certificate of Court of Appeals

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant Lanza contended that respondents threatened use and divulgence of the recording of Lanza's conversation with his attorney, which use and divulgence are sought to be enjoined in this action would deprive him of due process under the Fourteenth Amendment. The Court of Appeals held that the action said to be threatened by respondents, a lawfully constituted legislative investigating committee, would not in this case deprive appellant Lanza of his constitutional right to due process.

AND the Supreme Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

DOCKET NO. 377

JOSEPH LANZA and SYLVESTER COSENTINO,
Petitioners,

against

NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, individually and as chairman, ARNOLD BAUMAN, individually and as chief counsel,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

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NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, Individually and as Chairman, ARNOLD BAUMAN, Individually and as Chief Counsel,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The Court of Appeals wrote four opinions, one for the majority and three separate opinions by the dissenting judges. They are reported in 3 N. Y. 2d 92 and are printed in Appendix A to the petition.

The Appellate Division wrote an opinion reported in 2 App. Div. (2) 531 and printed in the record (R. 12).

Special Term wrote an opinion reported in 5 Misc. (2) 324 and printed in the record (R. 12).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Would the proposed action of the respondent, a joint legislative committee of the New York Legislature, to make a part of its record at a public session a tape recording and transcript, now in its possession, but made without the knowledge or participation of the committee, of an alleged private conference between the petitioners, assuming them to have been attorney and client, while the latter was in a local jail awaiting a determination as a parole violator, deprive him, the assumed client, of his constitutional right to the process by denying him his right to counsel and his privilege against self-incrimination?

2. May the respondents, an arm of the New York Legislature, one of the three co-ordinate branches of the State government, be enjoined by the courts from this proposed action?

Constitutional Provision Involved

The due process provision of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

The New York State Joint Legislative Committee on Government Operations was duly created in 1955 by the Legislature of the State of New York to investigate and examine into the management of any State department,

board, bureau, commission or other agency of the State and was empowered to make studies of the operations of State government to determine their efficiency and effectiveness, and to detect and prevent unsound, improper and corrupt practices.

In March 1957 the committee undertook to inquire into the way parole is administered in the State of New York and, in addition, to investigate the facts and circumstances concerning the arrest of petitioner Lanza for parole violations and his subsequent restoration to parole by decision of a member of the State Board of Parole in order to determine whether improper or corrupt considerations had influenced that decision.

While Lanza was in the Sheriff's Westchester County Jail in February 1957 awaiting the outcome of the parole violation charges, the jailers made a recording of a conversation between him and the petitioner Cosentino, a lawyer. This occurred only once although Cosentino visited and talked with Lanza at the jail on several occasions (Respondents' Brief, App. B, p. 5a, par. 7).

In the course of the committee's investigation which was commenced subsequent to Lanza's release from jail and restoration to parole, the committee learned of and came into possession of a copy of the recording.

Upon the commencement of public hearings by the committee on April 29, 1957, the petitioners obtained a temporary injunction in the Supreme Court of the State of New York, Special Term, against the committee's public use of the recording or transcripts thereof; at the same time the respondents' motion to dismiss the petitioners' complaint was dismissed (R. 12). There was no suggestion in the petitioners' complaint that the committee was acting outside of its jurisdiction or in excess of its authority or

that the information contained in the recording was not relevant to the subject under inquiry. (See also Opinion of Court of Appeals, Petition, App. A, p. 3a.) The complaint itself acknowledged the due creation and authorized powers of the committee (R. 7, Complaint).

Thereafter upon appeal by the respondents to the Appellate Division of the Supreme Court, the order granting the temporary injunction was reversed and the complaint was dismissed (R. 19, 21).

Thereafter the Court of Appeals by a four to three vote affirmed the judgment of the Appellate Division (Petition, App. B).

Consideration of Constitutional Point by State Courts

Special Term, in granting the temporary injunction, held that the recording of the conversation violated Lanza's right to counsel, finding that the relationship of lawyer and client had existed at the time of the conversation although three parole officers submitted affidavits to the court that Lanza had told them on several occasions while in custody on the parole violation charges that Cosentino was not his lawyer. (R. 12-16; Respondents' Brief, App. B.)

The Appellate Division in reversing Special Term, stated (opinion of App. Div., R. 26):

> "Nor does the right to a fair trial or the constitutional right to counsel with reference to Mr. Lanza become involved. Consequently, neither the tape recordings nor transcripts thereof are precluded from use by any existing rule or provision of law."

The remittitur of the Court of Appeals contains the following statement (Certificate of Court of Appeals, App. C, Petition):

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant Lanza contended that respondents' threatened use and divulgence of the recording of Lanza's conversation with his attorney, which use and divulgence are sought to be enjoined in this action would deprive him of due process under the Fourteenth Amendment. The Court of Appeals held that the action said to be threatened by respondents, a lawfully constituted legislative investigating committee, would not in this case deprive appellant Lanza of his constitutional right to due process."

Argument

The petitioners contend that Lanza had the right to counsel while in jail and that that right *would* be defeated by permitting the State Legislature, through its duly authorized committee, to make use of the alleged wrong committed by the county jailers. They also contend that such action by the committee would also defeat Lanza's privilege against self-incrimination. Finally, the respondents argue that, having established a violation of a constitutional right "by the recordings and the threatened use of them" the court may enjoin the contemplated legislative use. (Petition, pp. 17, 18.)

Throughout their argument the petitioners couple the act of recording with the proposed use of it by the committee. Assuming, *arguendo*, that the act of recording did constitute a violation of Lanza's right to counsel, nevertheless that act should not result in the prohibition of its use where no rights of the petitioners are at issue.

The law is clear that denial of the right to counsel in a criminal action or administrative proceeding directed against a defendant is a deprivation of due process. But the instant proceeding is a legislative inquiry not directed against Lanza. His constitutional rights will not be affected by the committee's use of the recording. Should the committee's use of it ever result in a criminal action against him, he has an adequate legal defense both under the law of New York and the decisions of this court. Moreover, there is some doubt whether Lanza, in jail awaiting a determination on a charge of violation of parole, was entitled to counsel under the Correction Law of New York. (Respondents' Brief, App. A.)

Further, the act of recording does not actually involve the privilege against self-incrimination. That privilege provides a prohibition against testimonial compulsion and not against the obtaining of evidence by other means. This court has held that this privilege, which is a constitutional guarantee of the Fifth Amendment, does not apply to the states by way of the Fourteenth Amendment.

Finally, it is well established that the courts will not interfere with the conduct of the legislative branch of its own business so long as the bounds of power and pertinency are not exceeded.

The issue is, simply and narrowly, may the committee use the recording in its public record?

It is submitted that the decision of the Court of Appeals in the instant matter is in consonance with the decisions of this court and that the petitioners' claim of violation of due process is not demonstrable.

The Proposed Action of the Committee Would Not Deprive Petitioner Lanza of His Constitutional Right to Due Process

The petitioners seek to enjoin the committee from making a part of its record at a public session the tape recording and transcript, now in its possession, of a conversation between them while the petitioner Lanza was in a local jail awaiting the outcome of a Parole Board investigation which would determine whether or not he had violated the conditions of his parole. There is no contention that the committee instigated or was in any way involved in the recording of the conversation (Cf. *Hearst* v. *Black*, 87 F. 2d 68, discussed, *infra*, at pp. 15, 16, in which a Senate committee instigated an illegal seizure of evidence by another agency of the government.) Yet the petitioners, claiming that the jailers who made the recording and the committee are both part of the same "sovereignty", argue that both are in *pari delicto* and to permit the committee to use the recording would make "a mockery of reality." (Petition, pp. 17, 18.)

As a matter of reality the committee, legally empowered to inquire into procedures and corruption in any agency of the State of New York, is concerned presently with the manner in which parole is handled in this state (opinion of Appellate Division, R. 26). In addition, although the recordings came into the hands of other public agencies, including the Board of Parole and the Commissioner of Investigation, a member of the executive branch of the state government, who conducted a like parole simultaneously with this committee, the petitioners singled out the committee to restrain but made no effort to restrain the Commissioner or the Board of Parole. (Opinion of Appellate Division, R. 25, 26.)

The petitioners have cited a number of cases which they claim support their assertion that a violation of due process against Lanza would result if the committee makes the recording a part of its record. (Petition, pp. 10-12; *People* v. *Cooper*, 307 N. Y. 253, cert. denied 348 U. S. 878; *Matter of Fusco* v. *Moses*, 304 N. Y. 424; *People* v. *Decina*, 2 N. Y. 2d 133; *Powell* v. *Alabama*, 287 U. S. 45; *Avery* v. *Alabama*, 308 U. S. 444; *Glasser* v. *United States*, 315 U. S. 60; *Coplon* v. *United States*, 191 F. 2d 749, cert. denied 342 U. S. 926; *Caldwell* v. *United States*, 205 F. 2d 879; *In re Bull*, 123 F. Supp. 389.) An examination of these cases reveals that in every instance the individual complaining of a violation of due process resulting from denial of the right to counsel, was a party to a proceeding, to wit, the defendant in a criminal action or administrative proceeding. In the instant matter, a legislative inquiry, Lanza is not a party and none of his rights will be affected by its action.

Moreover, a consideration of the law both state and federal indicates that Lanza has little, if anything, to fear, as a result of the recording whether or not the committee makes its proposed use of it. The Appellate Division in holding that since the information contained in the recording is in the hands of a number of public agencies and cannot now be retrieved, stated:

> "This does not mean, however, that the confidential communications thus obtained may be used against Mr. Lanza in any proceeding in which he is the target. Indeed, they may not", citing *People* v. *Cooper*, 307 N. Y. 253, cert. denied 348 U. S. 878, *supra* and *Coplon* v. *United States*, 191 F. 2d 749, cert. denied 342 U. S. 926, *supra* (R. 26).

Similarly, the Court of Appeals stated:

> "It is clear that if such interference had occurred in connection with a proceeding directed against Lanza, any resulting determination would be annulled by the courts on the ground that the interference with the right to counsel had destroyed his constitutional right to a fair trial," citing *Matter of Fusco* v. *Moses*, 304 N. Y. 424, *supra; People* v. *McLaughlin*, 291 N. Y. 480; *Caldwell* v. *United States*, 205 F. 2d 879, *supra; Coplon* v. *United States*, 191 F. 2d 749, *supra*, and *People* v. *Cooper*, 307 N. Y. 253, *supra*. (Petition, pp. 4a, 5a.)

As illustrative of this point is a recent proceeding in which the Commissioner of Investigation of the State of New York sought to have Sylvester Cosentino, the same individual who is a petitioner herein, adjudged guilty of contempt for refusing to answer questions about matters connected with Lanza's parole. The respondent Cosentino was not asked about the words of his conference with Lanza, contained in the recording, but was asked questions based on and reflecting the recording. The Appellate Division—the same court which has ruled that there is no constitutional right involved in the instant matter (R. 26)—sustained Special Term in refusing to adjudge the respondent Cosentino guilty of contempt. It held that he could not properly be interrogated about facts learned from the recording. *Matter of Reuter* v. *Cosentino*, 4 App. Div. (2) 252.

It would thus appear that the petitioner Lanza cannot be prosecuted or suffer any penalty resulting from information secured in the recording and that the petitioner Cosentino cannot be compelled to testify to any matter reflecting that information.

The committee's position cannot be stated better than by quoting from the opinion of the Court of Appeals in the instant case (Petition, p. 5a):

> "Here it is not claimed that the recording will be used in connection with any action or proceeding directed against Lanza—we merely have a legislative investigation and its findings are binding on no one. Lanza's right to a fair trial is in no wise being infringed upon since there is no trial, present or prospective. None of his property rights is involved. Consequently the use and disclosure of the communication, unconnected with any proceeding directed against Lanza, as distinguished from the act of recording, is not a basis for an injunctive action."

It is not the law, as indicated by petitioners' argument that the right to counsel is paramount and any interference with it should result in unlimited consequences. In the recent case of *In re Groban*, 352 U. S. 330, 1 Law. Ed. (2) 376, this court held that the denial of counsel to a witness at an investigation being conducted by the Fire Marshal of the State of Ohio, was not a deprivation of due process under the Fourteenth Amendment. In this case following a fire which had occurred on premises of a corporation owned and operated by the appellants, the Fire Marshal subpoenaed the appellants to an investigation conducted by him but refused to permit appellants' counsel to be present during their testimony. Thereupon the appellants refused to testify. They were adjudged guilty of contempt and jailed. In affirming the judgment of conviction this court stated (p. 354):

> "The presence of advisors to witnesses might easily so far encumber an investigatory proceeding as to make it unworkable or unwieldy. And with

so weighty a public interest as fire protection to protect, we cannot hold that the balance has been set in such a way as to be contrary to 'fundamental principles of liberty and justice.'"

Of similar result in the consideration of the due process clause of the Fourteenth Amendment have been the decisions of this court in *Adamson* v. *California*, 332 U. S. 46; *Wolf* v. *Colorado*, 338 U. S. 25, and *Stefanelli* v. *Minard*, 342 U. S. 117. In the *Adamson* case, this court, upholding a conviction for murder in the first degree in a court of the State of California, held that the privilege against self-incrimination as contained in the Fifth Amendment did not apply to the states, that the privilege is not inherent in the right to a fair trial and is therefore not on that basis protected by the due process clause of the Fourteenth Amendment. At issue was the constitutionality of the California law which permits the failure of a defendant to explain or to deny evidence against him to be commented upon by court and by counsel and to be considered by the jury. In arriving at its decision, this court assumed that a like statute in federal prosecutions would violate the Fifth Amendment.

In connection with a consideration of the privilege against self-incrimination, it should be noted that this privilege pertains to testimonial compulsion and not, as suggested by the petitioners, to the obtaining of evidence by other means, even if illegal. *People* v. *Defore*, 242 N. Y. 13; *Adams* v. *New York*, 192 U. S. 585, 597.

In the *Wolf* case, this court refused to set aside a conviction in a state prosecution in which illegally obtained evidence, the fruits of an illegal search and seizure, was admitted, holding, in conformity with the *Adamson* case, that the Fourth Amendment did not apply to the states

and was not imposed on them through the Fourteenth Amendment even though upon similar facts in a federal prosecution a conviction would be upset. And in the *Stefanelli* case, this court refused to enjoin the use of illegally obtained evidence in a pending state prosecution.

The *Wolf* case, despite the petitioners' contention that it concerned "the question of admissibility alone" (Petition, p. 16), stands, along with the *Adamson* and *Stefanelli* cases, for the proposition that this court will not upset a conviction in a state court predicated upon illegally obtained evidence even though it would not countenance similar conduct by Federal officials. *A fortiori*, this court should not interfere with the use of evidence in a legislative inquiry even if it believes that the evidence was illegally obtained.

The instant case does not involve the type of conduct which this court condemned as brutal in *Rochin* v. *California*, 342 U. S. 165. In that case, three state officers, acting upon information that the petitioner was selling narcotics, entered his home and forced their way into the bedroom occupied by him and his wife. When asked about two capsules lying on a bedside table, petitioner put them in his mouth. After an unsuccessful struggle to extract them by force, the officers took the petitioner, handcuffed, to a hospital, where an emetic was forced into his stomach through a tube against his will. As a result of the stomach pumping he vomited out the two capsules which were found to contain morphine. At the trial in a state court these were admitted in evidence over his objection and he was convicted of violating a state law forbidding possession of morphine. This court reversed the conviction because it was obtained by methods violative of the due process clause of the Fourteenth Amendment.

In commenting upon the assault and torture which the petitioner had suffered, this court stated (p. 172):

> "This is conduct that shocks the conscience. • • • They are methods too close to the rack and the screw to permit of constitutional differentiation."

However, the court made it clear that its conclusion was based on the unusual facts of the case and that it was not overruling precedent in this field. The court stated (p. 175):

> "In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record • • • ."
>
> • • • •
>
> "On the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause. The judgment below must be Reversed."

The *Rochin* case clearly dealt with an outrageous throwback to medieval practices of physical brutality. To attempt to equate such conduct with the instant case as an "invasion of privacy" (Petition, p. 16) is to ignore the plain language quoted above.

Although both the Appellate Division and the Court of Appeals have assumed Lanza's right to counsel in the instant matter, it is not clear if they considered the dif-

ference between a prisoner in jail awaiting a criminal trial and a prisoner in jail awaiting a decision on a question of parole violation. Sections 216 and 217 of the New York State Correction Law (Respondents' Brief, App. A) provide for retaking a paroled prisoner when his parole officer has reasonable cause to believe that the prisoner has violated his parole. Section 218 (Respondents' Brief, App. A) provides that the board of parole shall declare the prisoner delinquent and subsequently hold a parole court, to consider the case, at which the prisoner "shall be given an opportunity to appear personally, *but not through counsel or others,* before such board of parole and explain the charges made against him." (Emphasis supplied.)

Counsel is not aware of any case in New York in which the constitutional aspect of the denial of counsel pursuant to section 218 of the Correction Law has been considered. However, in *Escoe* v. *Zerbst,* 295 U. S. 490, this court stated (p. 492):

> "In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose."

In *Fleming* v. *Tate,* 156 F. 2d 848, the court construed the federal statute on parole violation hearing to mean that the prisoner may have counsel at such a hearing if he so elects, but stated (p. 849):

> "No constitutional right is involed, as parole is a matter of grace."

The Courts are Without Power to Restrain a Legislature Acting Within its Constitutional Power of Inquiry Upon Matters Relevant Thereto.

Applying the doctrine of separation of powers under which our governments, both state and federal, operate, the courts have consistently declared that they lack the authority to enjoin the legislative branch of the government in the latter's exercise of its constitutional functions. *Hearst* v. *Black*, 87 F. 2d 68; *Nelson* v. *United States*, 208 F. 2d 505, 513, cert. denied 346 U. S. 827; *Barsky* v. *United States*, 167 F. 2d 241, 250, cert. denied 334 U. S. 843; *People ex rel. Bender* v. *Milliken*, 183 N. Y. 35; *Matter of Joint Legislative Comm. to Investigate State Educ. System* [*Teachers Union*], 285 N. Y. 1. Equally well established is the proposition that the power of inquiry generally exercised on behalf of the legislature by its committees, is an essential auxiliary to the constitutional legislative function. *McGrain* v. *Daugherty*, 273 U. S. 135, 174 *et seq.*; *Matter of Joint Legislative Comm. to Investigate State Educ. System* [*Teachers Union*], 285 N. Y. 1, *supra*.

In *Hearst* v. *Black*, *supra*, the Federal Communications Commission acting on the request of a Senate committee investigating lobbying, illegally seized copies of telegrams from a telegraph company's office and turned them over to the committee. The court in sustaining the district court's refusal to restrain the committee "from keeping the messages or making any use of them or disclosing their contents", although it acknowledged the existence of property rights in the telegrams and the power of a court of equity to enjoin such a trespass whether by private or governmental persons, held that to enjoin the committee from the use of the information in its possession

would be an invasion of the legislature's independence, that a court of equity has no authority to restrain the latter acts, adding (p. 71) that the universal rule "is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference."

In *Nelson* v. *United States, supra,* certain documents which had been illegally obtained from the defendant's home by an employee of a Senate committee, were subsequently turned over to the United States Attorney and used as evidence in the trial of the defendant for operating a lottery in violation of the District of Columbia lottery law. Although the court set aside the conviction because the acts complained of constituted an illegal seizure of evidence, the Senate employee having acted without a search warrant, it reiterated the principle of *Hearst* v. *Black, supra,* stating (p. 513):

> "Though a court can no more enjoin a congressional committee from making an unconstitutional search and seizure than it can enjoin Congress from passing an unconstitutional bill (citing *Hearst* v. *Black*), a court does have the power and duty to deny legal effect in an action before it."

In *Barsky* v. *United States,* 167 F. 2d 241, *supra,* the court in upholding the conviction of the defendant for having failed to produce records subpoenaed by the House Un-American Activities Committee, held it could not review the conduct of members of the committee, stating (p. 250):

> "The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded (citing *McGrain* v. *Daugh-*

> *erty*, 273 U. S. 135, *supra*) and the mere possibility that the power of inquiry may be abused 'affords no ground for denying the power' ".

Similarly in *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729 (D. Nev.), the District Court refused to enjoin a Senate subcommittee and the Public Printer from printing and distributing a document characterizing the plaintiff as a Communist front, an alleged libel. As to the Senate committee, the complaint was dismissed "for lack of jurisdiction" on the authority of *Hearst* v. *Black*, 8 F. 2d 68, *supra*.

The New York courts are in accord with the principles enunciated in the preceding federal cases. In *Matter of Joint Legislative Comm. to Investigate State Educ. System [Teachers Union]*, 285 N. Y. 1, *supra*, the Court of Appeals in upholding an adjudication of the defendant for contempt for failure to produce subpoenaed records before a joint legislative committee, stated (p. 8):

> "" • • • The same principle which renders it the duty of the courts to hold legislative action illegal when it unduly encroaches upon the province of the judiciary, forbids interference by the latter with the action of legislative bodies or the exercise of their discretion in matters within the range of their constitutional powers' ". (Quoting from *People ex rel. McDonald* v. *Keeler*, 99 N. Y. 463.)

A similar conclusion was reached in *People ex rel. Bender* v. *Milliken*, 185 N. Y. 35, *supra*, in which the court sustained the authority of the State Civil Service Commission, conferred by statute, to hold inquiries and to subpoena witnesses in connection therewith for the purpose of reporting to the Governor on the operation of the Civil Service Law. The court stated (p. 40):

> "The function so performed by the commission is strictly analogous to that of a legislative committee of inquiry or investigation. It is not a valid objection to such an investigation that it may disclose crime or wrongdoing on the part of the individuals, provided its object is the fra[illegible]ng and enactment of proper laws or regulations.

In conformity with the preceding principles the Court of Appeals in the instant case, 3 N. Y. 2d 92, stated (Petition, p. 5a):

> "No contention is made that the information sought to be used is not relevant to this purpose, and in such case the judiciary would be usurping authority if it enjoined the legislative branch of our government, in the exercise of its constitutional functions, from using and making a part of its public record the information from the recording involved here", citing *Hearst* v. *Black*, 87 F. 2d 68, *supra; Nelson* v. *United States*, 208 F. 2d 505, cert. denied 346 U. S. 827, *supra; Barsky* v. *United States*, 167 F. 2d 241, *supra; Matter of Joint Legislative Com. to Investigate State Educ. System* [*Teachers Union*], 285 N. Y. 1, *supra*

The petitioners in their brief contend that the courts have the power to enjoin the legislature, which the Court of Appeals has held they do not, and have cited a number of cases in support of their contention. (Petition, pp. 17-20.) *Youngstown* v. *Sawyer*, 343 U. S. 579, cited for the proposition that this Court has enjoined the President of the United States (Petition, p. 18) holds that the President, in directing his Secretary of Commerce to seize the steel mills, was acting beyond his constitutional or statutory powers and was, in effect, attempting to create a power that only the Congress had power to create by legis-

lation. Similarly, in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (Petition, p. 19), this Court held that a law which authorized the President to regulate certain trade by executive order "without standard or rule" committed to him "the functions of a legislature rather than those of an executive or administrative officer" and therefore was unconstitutional. In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, and *Work* v. *Louisiana*, 269 U. S. 250 (Petition, p. 19), cabinet members were enjoined by this Court because their actions had exceeded the scope of the authority conferred on them by executive orders.

The petitioners further contend that the courts may exercise the power to restrain even without affirmative authority granted to them, citing *Watkins* v. *United States*, 354 U. S. 178, 1 L. Ed. (2) 1273, and *Jurney* v. *MacCracken*, 294 U. S. 125 (Petition, p. 19). An examination of these cases, it is submitted, fails to support such a conclusion. In the *Watkins* case, this Court reversed the conviction of the defendant for contempt of Congress under Section 192 of 2 U.S.C. holding that it was incumbent upon the investigating committee to state for the witness the pertinency of the question propounded to the subject under inquiry. The court stated that since Congress had invoked the aid of the federal judicial system in protecting itself against contumacious conduct, the court must accord to the defendants every right guaranteed in all criminal cases. Mr. Justice Frankfurter in a concurring opinion wrote (p. 215):

> "By thus making the federal judiciary the affirmative agency for enforcing the authority that underlies the congressional power to punish for contempt, Congress necessarily brings into play the specific provisions of the Constitution relating to the prose-

> cution of offenses and those implied restrictions under which courts function."

In *Jurney* v. *MacCracken, supra*, cited by the petitions as "an additional authority to sustain the principle that the judiciary may intervene against anyone including a House of Congress when claim is made of the denial of a constitutional right" (Petition, p. 19), this Court sustained the Supreme Court of the District of Columbia which had discharged a writ of habeas corpus issued against Jurney, Sergeant-at-Arms of the Senate and had dismissed the petition brought by MacCracken who had been cited by the Senate to show cause why he should not be punished for contempt of that body. In upholding the Senate's power to enforce its authority by arrest and punishment, this Court stated (p. 152):

> "The contempt with which MacCracken is charged is 'the destruction and removal of certain papers.' Whether he is guilty, and whether he has so far purged himself of contempt that he does not now deserve punishment, are the questions which the Senate proposed to try. The respondent to the petition did not, by demurring, transfer to the court the decision of those questions. The sole function of the writ of *habeas corpus* is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes."

The remaining cases cited by Petitioners on the point of this Court's power to enjoin the legislature (Petition, pp. 18-20) involve instances in which executive officers had exceeded their authority, had committed unconstitutional acts or had attempted to enforce unconstitutional laws. (*Sterling* v. *Constantin*, 287 U. S. 378; *Hague* v. *CIO*, 307 U. S. 496; *Ex parte Young*, 209 U. S. 123; *Brown*

v. *Board of Education*, 347 U. S. 483; *Pauchogue Land Corp.* v. *State Park Commission*, 243 N. Y. 15.)

In the instant case it is not disputed that the committee hearings are being conducted in furtherance of a legitimate legislative object by express authorization of the Legislature itself pursuant to law and that the information the committee seeks to make a part of its record is within the scope of its inquiry. (See opinion of Court of Appeals, Petition, Appendix A, pp. 3a, 5a.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ARNOLD BAUMAN,
BERTRAM D. SARAFAN,
Counsel for Respondents.

APPENDIX A

New York Correction Law:

"§216. Violation of parole.

If the parole officer having charge of a paroled prisoner or a prisoner received under the uniform act for out-of-state parolee supervision shall have reasonable cause to believe that such prisoner has lapsed, or is probably about to lapse, into criminal ways or company, or has violated the conditions of his parole in an important respect, such parole officer shall report such fact to a member of the board of parole or to any officer of the division of parole designated by such board, who thereupon shall issue a warrant for the retaking of such prisoner and for his temporary detention or return to a designated prison. The retaking, detention or reimprisonment of any such prisoner may be further regulated by the rules of the board not inconsistent with this article. Such warrant shall constitute sufficient authority to the peace officer to whom it is issued and to the superintendent or other person in charge of any jail, penitentiary, lockup or detention pen to whom it is exhibited to hold in temporary custody the prisoner retaken pursuant thereto. As amended L. 1945, c. 678, §2; L. 1954, c. 1952, §1, eff. July 1, 1954."

"§217. Retaking of a violator of parole.

Any parole officer or any officer authorized to serve criminal process, or any peace officer to whom such warrant shall be delivered is authorized and required to execute such warrant by taking such prisoner and having him detained or returning him to the prison designated by the commissioner of correction, to be held to await the action of the board of parole. * * *"

Appendix A

"§218. Board of parole to act on violations of parole. Whenever there is reasonable cause to believe that a prisoner who has been paroled by the state board of parole, has violated his parole, such board of parole at its next meeting shall declare such prisoner to be delinquent and time owed shall date from such delinquency. The warden of each prison and the superintendents of the other institutions named in section two hundred and ten of this article, shall promptly notify the state board of parole of the return of a paroled prisoner charged with violation of his parole. Thereupon, such board of parole shall, as soon as practicable, hold a parole court at such prison and consider the case of such parole violator, who shall be given an opportunity to appear personally, but not through counsel or others, before such board of parole and explain the charges made against him. The board of parole shall within a reasonable time act upon such charges, and may, if it sees fit, require such prisoner to serve out in prison the balance of the maximum term for which he was originally sentenced calculated from the date of delinquency or such part thereof as it may determine, or impose such punishment as it deems proper, subject to the provisions of the next section. As amended L. 1945, c. 678, §3, eff. July 1, 1945."

APPENDIX B

Affidavit of Arnold Bauman in Opposition

Supreme Court of the State of New York

COUNTY OF NEW YORK

JOSEPH LANZA and SYLVESTER COSENTINO,

Plaintiffs,

against

NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, Individually and as Chairman, ARNOLD BAUMAN, Individually and as Chief Counsel,

Defendant.

State of New York }
County of New York } ss.:

ARNOLD BAUMAN, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in this State, and am the Chief Counsel of the New York State Joint Legislative Committee on Government Operations (hereinafter "Committee"), one of the defendants in this action. I am also named as a defendant.

2. This affidavit is submitted in opposition to plaintiffs' motion for an injunction *pendente lite* to restrain defendants and "all others associated with them • • • from using or employing the use of certain electronic

recordings containing confidential communications between Joseph Lanza, client and Sylvester Cosentino, attorney". Lanza and Cosentino are the plaintiffs in the action. They seek a declaratory judgment and a permanent injunction.

3. A copy of the order to show cause bringing on this application, signed by Mr. Justice Thomas A. Aurelio, and copies of supporting papers annexed thereto were served upon me on Saturday, April 27, 1957, at 1:45 P.M. at the offices of the Committee.

4. A stay provision contained in the proposed order to show cause appears to have been stricken by Justice Aurelio.

5. Service of the motion papers followed a telephone conversation on Friday, April 26, 1957 between plaintiff Cosentino, who made the call, and myself. The account of that conversation in Mr. Cosentino's moving affidavit (pages 3 and 4) is distorted. Mr. Cosentino stated that he was concerned over the violation of his privilege with respect to a conversation with Lanza. I informed Mr. Cosentino, in substance, that I could not understand his concern, since he was not violating any professional confidence. I told him that use of the recording by the Committee was proper and that such use would not constitute violation by Mr. Cosentino of any professional confidence.

6. The statement made by me to Mr. Cosentino summarizes in part the legal position of defendants. The Committee intends, in the course of its public hearings, to introduce all evidence deemed relevant to the restoration to parole of Joseph Lanza during the month of

February, 1957. Such evidence will include the recording in question and the transcript thereof prepared by the Committee. The recorded and transcribed conversation has been in legal effect, overheard. Accordingly, as defendants' memorandum of law will show, the privilege which may attach to the testimony of either an attorney or a client is inapplicable to conversations overheard by third parties, or to the use of records of the overheard communication.

7. With respect to the recording itself: There is but one recording in the possession of the Committee containing a conversation between plaintiffs Lanza and Cosentino. To the best of my knowledge and belief, based upon conversations with employees of the Division of Parole, it represents the *only* conversation between the two men that was recorded, although Mr. Cosentino visited Lanza at the Sheriff's Westchester County jail on several occasions and talked with him on each occasion.

8. Moreover, I am informed by employees of the Division of Parole that plaintiff Cosentino was not, at the time of the conversation of February 7, 1957, the attorney of plaintiff Lanza. Affidavits to that effect are in the process of preparation and will be submitted to the Court with its permission after argument.

9. Entirely apart from privilege, the preliminary question of jurisdiction of the Court over proceedings of the Committee is dispositive of the motion and action herein. The complaint (pars. First, Third and Fourth) annexed to plaintiffs' moving papers alleges affirmatively and unequivocally the due creation by the Legislature of the

Committee, and its authority to inquire into the matters before it. There is no suggestion and no claim by plaintiffs that the Committee is acting without jurisdiction or in excess of authority. The law is clear, as defendants' memorandum will show, that the Court is without power, under the circumstances, to restrain the Committee or its employees in the performance of duties mandated by the Legislature.

WHEREFORE, it is respectfully requested that plaintiffs' motion be in all respects denied, and the complaint dismissed.

/s/ ARNOLD BAUMAN

(Sworn to April 29, 1957.)

Appendix B

Affidavit of Bertram D. Sarafan

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York
County of New York } ss.:

BERTRAM D. SARAFAN, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the courts of this State, and am the Assistant Chief Counsel of the New York State Joint Legislative Committee on Government Operations (hereinafter "Committee"), one of the defendants herein. I submit this affidavit in connection with the application of plaintiffs for a temporary injunction restraining defendants from making use of a certain recording containing a conversation between Joseph Lanza and Sylvester Cosentino.

2. The recording in question, containing portions of a conversation between said Joseph Lanza and Sylvester Cosentino, is in the possession of the Committee. I have had the recording played repeatedly in my presence over a period of many hours, and am fully familiar with the recorded conversation.

3. In connection with my duties as Assistant Chief Counsel to the Committee I have compared the recording, as played, with a typewritten transcript thereof turned over to the Committee by the New York State Division

of Parole. I have made corrections of and additions to the transcript, in the course of repeated playbacks of the recording, and I have supervised the preparation of a corrected typewritten transcrip. of the said recording. The actual typing was done by ıy secretary, Mildred Spiro, an employee of the Committe. This transcript has been mimeographed for the use of ıe Committee.

4. Upon information and belief, the recording in possession of the Committee, which is the subject of the action and motion herein, was made from a disc in the office of the Chairman of the New York State Board of Parole in Albany. The disc was made from the original recording taken in the Sheriff's Westchester County jail. Accordingly, the Committee's recording is a copy of a copy. The sources of my information and belief are conversations with Robert McGuiness, a member of the Committee's staff who, together with a technician employed by the Committee, made the recording in question at the office of the Chairman of the Board of Parole.

5. It is beyond dispute, therefore, that the recording has been played in the presence of persons not parties to the conversation between plaintiffs Lanza and Cosentino, and that the contents thereof are no longer confidential as between these two persons.

/s/ BERTRAM D. SARAFAN

(Sworn to April 29, 1957.)

Appendix B

Affidavit of Mildred Spiro

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York
County of New York } ss.:

MILDRED SPIRO, being duly sworn, deposes and says:

1. I am an employee of the New York State Joint Legislative Committee on Government Operations, and the secretary of Bertram D. Sarafan, its Assistant Chief Counsel, I submit this affidavit in connection with the pending application to restrain use by the Committee of a recording containing a certain conversation between Joseph Lanza and Sylvester Cosentino.

2. In the course of my duties I was instructed by Mr. Sarafan to prepare a typewritten transcript of said recording, including a conversation between Joseph Lanza and Sylvester Cosentino, from notes made by Mr. Sarafan correcting and adding to a previously prepared typewritten transcript of the recording. I typed such a transcript, and am familiar with its contents, including that portion which contains the conversation in question.

/s/ MILDRED SPIRO

(Sworn to April 29, 1957.)

Appendix B

Supplemental Affidavit of Boris S. Berkovitch

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York }
County of New York } ss.:

BORIS S. BERKOVITCH, being duly sworn, deposes and says: 1. I am an attorney duly admitted to practice in this State, am Special Counsel to the New York State Joint Legislative Committee on Government Operations, and the attorney for defendants in the within action.

2. I submit this affidavit pursuant to the ruling of the Court that all additional papers in the motion argued today, April 29, 1957, at Special Term, Park III, be submitted by 4:00 P.M.

3. Counsel for plaintiffs submitted an unsworn statement of plaintiff Lanza in connection with the hearing of this motion. It is respectfully submitted that an unsworn statement should be disregarded in any event, and most particulary when its source is a presently incarcerated convict, as is the case.

4. Submitted herewith are affidavits of John L. Clark, Abe Simon, and Frank E. Lawrence, Parole Officers of the New York State Division of Parole. These affidavits

make clear for the record that plaintiff Cosentino was not the attorney for plaintiff Lanza at the time of the conversation in question, nor subsequently.

5. It is respectfully submitted that plaintiffs' motion for injunctive relief should be denied and the complaint dismissed.

BORIS S. BERKOVITCH

(Sworn to April 29, 1957.)

Appendix B

Affidavit of Frank E. Lawrence

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York
County of New York } ss.:

FRANK E. LAWRENCE, being duly sworn, deposes and says:

He is a Parole Officer of the New York State Division of Parole assigned to the New York Area Office of the Division of Parole. For some time prior to February 5, 1957, the parolee Joseph "Socks" Lanza was under the supervision of Parole Officer John L. Clark.

On the night of February 5, 1957, your deponent, accompanied by Parole Officers John L. Clark, John J. McCarthy and Abe Simon went to Lanza's apartment at 300 West 23rd Street, New York, N. Y. in order to execute a warrant for the arrest of Lanza because of a violation of parole. The Parole Officers found the parolee Lanza and his wife, Ellen Lanza in the apartment.

Shortly after the Parole Officers entered the apartment, your deponent overheard Mrs. Lanza ask Joseph Lanza what was it all about (indicating the visit of the Parole Officers and overheard Lanza reply it was nothing, that Mr. Clark wanted to see him for a couple of minutes. Your deponent then overheard Mrs. Lanza ask Joseph Lanza if she should call "Sylvester" and Lanza replied that she should not, that they should see what this is.

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Your deponent overheard Joseph Lanza ask Parole Officer Clark if he could come to the latter's office the next morning to discuss the matter. Clark informed Lanza that he was to be taken into custody that night.

The Parole Officers remained in the apartment for more than two hours searching the premises. Near the close of this period your deponent overheard Mrs. Lanza again ask Lanza if she should call "Sylvester" and Lanza replied that if it would make her feel better, to do so.

After leaving the apartment, the Parole Officers took Lanza, by automobile, to the Sheriff's Westchester County Jail at East View, New York. En route, your deponent asked Lanza who "Sylvester" was and Lanza replied that "Sylvester" was a friend of the family, his wife's lawyer.

On February 7, 1957, your deponent, accompanied by Parole Officers Simon and Clark, took Lanza by automobile, from the Sheriff's Westchester County Jail to Long Beach, New York. En route, your deponent asked Lanza who "Cosentino" was and Lanza replied that he was a friend of the family, his wife's attorney, that he (Cosentino) was not going to get paid and, in fact, would not take any money. Lanza added it made his wife feel good to talk to Cosentino. Finally, Lanza stated that he was "not fighting this" (the parole violation proceedings), that he was going to cooperate with the parole authorities and not fight the proceedings, although he could.

On February 16, 1957 the deponent accompanied by Parole Officers Clark and Simon interviewed Lanza who was still incarcerated at the Sheriff's Westchester County Jail. Parole Officer Clark asked Lanza if "Sylvester"

was Lanza's attorney. Lanza replied, "I told you he wasn't".

As a result of the foregoing, your deponent has at all times had the understanding and conclusion that Sylvester Cosentino was never Joseph Lanza's lawyer.

FRANK E. LAWRENCE

(Sworn to April 26, 1957.)

Appendix B

Affidavit of Abe Simon

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York }
County of New York } ss.:

ABE SIMON, being duly sworn deposes and says:

He is a Parole Officer of the New York State Division of Parole assigned to the New York Area Office of the Division of Parole. For some time prior to February 5, 1957, the parolee Joseph "Socks" Lanza was under the supervision of Parole Officer John L. Clark.

On the night of February 5, 1957, your deponent, accompanied by Parole Officers Frank E. Lawrence, John J. McCarthy and John L. Clark went to Lanza's apartment at 300 West 23rd Street, New York, N. Y., in order to execute a warrant for the arrest of Lanza because of a violation of parole. The Parole Officers found the parolee Lanza and his wife, Ellen Lanza in the apartment.

Shortly after the Parole Officers entered the apartment, your deponent overheard Mrs. Lanza ask Joseph Lanza what was it all about (indicating the visit of the Parole Officers) and overheard Lanza reply that it was nothing, that Mr. Clark wanted to see him for a couple of minutes. Your deponent then overheard Mrs. Lanza ask Joseph Lanza if she should call "Sylvester" and Lanza reply that she should not, that they should see what this is.

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Your deponent overheard Joseph Lanza ask Parole Officer Clark if he could come to the latter's office the next morning to discuss the matter. Clark informed Lanza that he was to be taken into custody that night.

The Parole Officers remained in the apartment for more than two hours searching the premises. Near the close of this period your deponent overheard Mrs. Lanza again ask Lanza if she should call "Sylvester" and Lanza reply that if it would make her feel better, to do so.

After leaving the apartment, the Parole Officer took Lanza, by automobile, to the Sheriff's Westchester County Jail at East View, New York. En route, your deponent overheard Parole Officer Lawrence ask Lanza who "Sylvester" was and Lanza reply that "Sylvester" was a friend of the family, his wife's lawyer.

On February 7, 1957, your deponent, accompanied by Parole Officers Clark and Lawrence, took Lanza, by automobile, from the Sheriff's Westchester County Jail to Long Beach, New York. En route, your deponent overheard Parole Officer Lawrence again ask Lanza who "Cosentino" was and Lanza reply that he was a friend of the family, his wife's attorney, that he (Cosentino) was not going to get paid and, in fact, would not take any money. Lanza added it made his wife feel good to talk to Cosentino. Finally, Lanza stated that he was "not fighting this" (the parole violation preceedings), that he was going to cooperate with the parole authorities and not fight the proceedings although he could.

On February 16, 1957, the deponent, accompanied by Parole Officers Clark and Lawrence, interviewed Lanza who was still incarcerated at the Sheriff's Westchester

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County Jail. Parole Officer Clark asked Lanza if "Sylvester" was Lanza's attorney. Lanza replied, "I told you he wasn't."

As a result of the foregoing, your deponent has at all times had the understanding and conclusion that Sylvester Cosentino was never Joseph Lanza's lawyer.

ABE SIMON

(Sworn to April 26, 1957.)

Appendix B

Affidavit of John L. Clark

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York
County of New York } ss.:

JOHN L. CLARK, being duly sworn, deposes and says:

He is a Parole Officer of the New York State Division of Parole assigned to the New York Area Office of the Division of Parole. For some time prior to February 5, 1957, the parolee Joseph "Socks" Lanza was under his supervision.

On the night of February 5, 1957 your deponent, accompanied by Parole Officers Frank E. Lawrence, John J. McCarthy and Abe Simon went to Lanza's apartment at 300 West 23rd Street, New York, N. Y. in order to execute a warrant for the arrest of Lanza because of a violation of parole. The Parole Officers found the parolee Lanza and his wife, Ellen Lanza in the apartment.

Shortly after the Parole Officers entered the apartment, your deponent overheard Mrs. Lanza ask Joseph Lanza what was it all about (indicating the visit of the Parole Officers) and overheard Lanza reply it was nothing, that Mr. Clark wanted to see him for a couple of minutes. Your deponent then overheard Mrs. Lanza ask Joseph Lanza if she should call "Sylvester" and Lanza reply that she should not, that they should see what this is.

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Joseph Lanza asked your deponent if he could come to the latter's office the next morning to discuss the matter. Your deponent informed him that he was to be taken into custody that night.

The Parole Officers remained in the apartment for more than two hours searching the premises. Near the close of this period your deponent overheard Mrs. Lanza again ask Lanza if she should call "Sylvester" and Lanza reply that if it would make her feel better, to do so.

After leaving the apartment, the Parole Officers took Lanza, by automobile, to the Sheriff's Westchester County Jail at East View, New York. En route, your deponent overheard Parole Officer Lawrence ask Lanza who "Sylvester" was and Lanza reply that "Sylvester" was a friend of the family, his wife's lawyer.

On February 7, 1957, your deponent, accompanied by Parole Officers Simon and Lawrence, took Lanza, by automobile, from the Sheriff's Westchester County Jail to Long Beach, New York. En route, your deponent overheard Parole Officer Lawrence ask Lanza who "Cosentino" was and Lanza reply that he was a friend of the family, his wife's attorney, that he (Cosentino) was not going to get paid and, in fact, would not take any money. Lanza added it made his wife feel good to talk to Cosentino. Finally, Lanza stated that he was "not fighting this" (the parole violation proceedings), that he was going to cooperate with the parole authorities and not fight the proceedings although he could.

On February 16, 1957, the deponent accompanied by Parole Officers Lawrence and Simon, interviewed Lanza who was still incarcerated at the Sheriff's Westchester

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County Jail. Your deponent asked Lanza if "Sylvester" was Lanza's attorney. Lanza replied, "I told you he wasn't".

On February 19, 1957 Mrs. Lanza, accompanied by Sylvester Cosentino, appeared at your deponent's office at 320 Broadway, New York, N. Y., at your deponent's request, to be interviewed about her husband's affairs. In the course of the interview, either Mrs. Lanza or Mr. Cosentino, in the presence of the other, stated to your deponent in substance and effect that Mr. Cosentino was not Joseph Lanza's lawyer and was merely accompanying and helping Mrs. Lanza at the interview. (Your deponent cannot recall which one so stated.)

As a result of the foregoing, your deponent has at all times had the understanding and conclusion that Sylvester Cosentino was never Joseph Lanza's lawyer.

JOHN L. CLARK

(Sworn to April 26, 1957.)